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THE  
HISTORY  
OF THE  
COMMON LAW;

BY  
SIR MATTHEW HALE. R

THE FIFTH EDITION,  
(WITH CONSIDERABLE ADDITIONS)

ILLUSTRATED WITH  
NOTES AND REFERENCES,  
AND  
SOME ACCOUNT OF THE LIFE OF THE AUTHOR.

By CHARLES RUNNINGTON,  
SERJEANT AT LAW.

Of Law no less can be acknowledged, than that her seat is the  
bosom of God; her voice the harmony of the world; all things  
in heaven and earth do her homage; the very least, as feeling her  
care, and the greatest, as not exempted from her power.

HOOVER.

IN TWO VOLUMES.  
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1794.





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P R E F A C E.

**T**HOUGH the approbation of Sir MATTHEW HALE was of itself sufficient to insure success to any production, yet this History was dismissed from the closet without soliciting indulgence by a prefatory discourse, or claiming respect from the authority of his name. It were needless to mention the rapid success which attended, or the generous applause which was bestowed on its publication; it is sufficient to remark, that it has ever been justly held in the highest estimation; and, like the virtue of its author, been universally admired. Here the student finds a valuable guide;—the advocate a learned assistant;—the court an indisputable authority. The impossibility of adding to its celebrity cannot but be acknowledged. I have only to hope (vain as the hope may be) that my labours may promote inquiry and reward attention;



# P R E F A C E.

tion ; for (without assuming the merit of even diligence or accuracy) I can with truth assert, that I have applied the utmost of my ability faithfully to execute the task of Editor.

P R E F A C E.

C. RUNNINGTON,

THOUGH the approbation of Mr. MATTHEW HARRIS was of itself sufficient to insure success to any production, yet this History was distinguished from the others without soliciting indulgence by a profuse display of disquisitions, or claiming respect from the authority of his name. It was needless to mention the rapid success which attended, or the generous applause which was bestowed on its publication ; it is sufficient to remark, that it has ever been justly held in the highest estimation ; and, like the value of its author, been universally admitted. Hence the student finds a valuable guide ; the advocate a learned ally ; the court an indispensible authority. The impossibility of adding to its celebrity cannot but be acknowledged. I have only to hope (as the hope may be) that my efforts may promote inquiry and extend science.

## ADVERTISEMENT

TO THIS EDITION.

SINCE the publication of the fourth edition of this work, the EDITOR hath endeavoured to make his labours less reprehensible. He frankly confesses, that, on revision, he found some parts requiring emendation, and others capable of improvement. Many faults he has corrected, and some deficiencies he has supplied. In truth, though the Additions are considerable, he trusts that the Profession, in its candour, will not think they have been improvidently accumulated.

Serjeants Inn, May 1, 1794.

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L. A.

SOME  
ACCOUNT  
OF THE  
LIFE  
OF  
SIR MATTHEW HALE.

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——— *quid virtus, et quid sapientia possit,*  
*Utile proposuit nobis exemplar.*———

HOR. Epist.

**S**IR MATTHEW HALE was born at Alderley, in Gloucestershire, on the first of November 1609. During his minority, nothing transpired of sufficient consequence to merit either observation or recital. In the seventeenth year of his age he was entered of Magdalen-hall, in the University of Oxford; and on the 8th of November 1629 was admitted of Lincoln's Inn; where, if the authority of Burnet may be relied on, he studied many years at the rate of sixteen hours



a-day (*a*). Be that as it may, the diligence with which he pursued his studies is evident from his success. The jurisprudence of his own country, though the first, was by no means the sole object of his attention. He applied himself with great avidity to the contemplation of the Roman law; and though he preferred our mode of decision by jury to that of the civilians, who entrust too much to the judge, yet he often affirmed, that the principles of jurisprudence were so well delivered in the Digests, that law could not be understood as a science without first resorting to them for information. This may in some degree be disputable; it is not however so self-evident, but it may, with deference, be doubted. Admitting that the knowledge of the civil law has deservedly been considered as no small acquisition to the English student; yet is it, in reality, essential to the understanding of our own municipal system, which, sanctified as it is, requires not assistance from any foreign code, however admirable, or however just? “We must not” (says the learned and elegant Commentator) “carry our veneration so far, as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian; we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions

(*a*) The human mind is incapable of such exertion for any great length of time: a milder mode meets with the approbation of the laborious Sir Edward Coke.—Co. Lit. 64. b.

“ of

“ of an English parliament, unless we can also  
 “ prefer the despotic monarchy of Rome and  
 “ Byzantium, for whose meridian the former were  
 “ calculated, to the free Constitution of Britain,  
 “ which the latter are adapted to perpetuate (b).”

GREAT improvement is, in general, the result of intense application. In the revolution of a few years, HALE had obtained not only a high professional reputation, but was allowedly well versed in scholastic knowledge. That he was perfectly conversant with the discoveries of the age in which he lived, is evident from the treatise which he wrote on the rarefaction and condensation of air; a treatise which shews as great accuracy, and as much subtilty, as the principles to which he adhered would admit. Ancient history, chronology, and philosophy, amused him in the moments of relaxation; and, through his intimacy with Mr. Selden, he understood the most curious points of rabbinical learning.

WHERE different sciences are pursued at the same time, if one be abstracted and unpleasant, the other should be less abstruse and more entertaining; for when pleasure succeeds the labour of application, the fatigue of meditation is borne with undisturbed tranquillity:—thus, while a dull and heavy hour is relieved by some alluring employ-

(b) Blac. Comm. oct. vol. i. p. 5.

ment of the mind, diversion enriches the understanding, and pleasure is turned to advantage. Such was the opinion of HALE, who, when wearied with studying either law or divinity, would, to use his own words, "recreate himself with philosophy" or mathematics." In his opinion, no man could be master of any profession, without having some skill in all the sciences. The mathematics, indeed, reward attention with demonstration, and when pursued with inflexible application, strengthen and enlarge the powers, while they confine the luxuriance of the human mind; but though they render us more scientific, yet they neither increase our virtue, nor facilitate our happiness. HALE, however proficient in the science, used it only as subservient to more serious avocations.

He seemed particularly attached to the study of divinity; and those who read his religious disquisitions, may conclude, that the science of theology engaged the principal part of his attention. Here it is but justice to remark, that so averse was he from the dissipation of time, that he would not even correspond with his friends, except on necessary business, or matters of learning. Like Boerhaave, he lost none of his hours, but, when he had attained one science, attempted another. In short, he made every human aid contribute in advancing him to a superior degree of knowledge and of wisdom.

Soon

## SIR MATTHEW HALE.

SOON after his appearance at the bar, the Civil War commenced ; and when the Earl of Strafford and Archbishop Laud (who had espoused the cause of Charles I.) were tried, he was assigned their counsel (*c*) : he had afterwards the honour of being assigned to officiate in that character for the king himself ; but was not in this instance permitted to plead, because Charles had refused submission to the jurisdiction which had assumed the power of trying him.

THE brief recital of the trial of a sovereign, in whose defence it may rationally be supposed HALE was from principle interested, added to a conjecture, not altogether improbable, that he furnished the objections which Charles so pointedly applied, will neither, I trust, obtrude on the attention, nor weary the patience, of the reader.

“ THE dignity of this transaction” (says the philosophic historian) “ corresponded to the greatest “ conception that is suggested in the annals of hu-

(*c*) Burnet affirms that he was retained for Strafford and Laud, yet it does not by the trial appear that Hale was retained for the earl, whose counsel were Mr. Lane, Mr. Gardiner, Mr. Loe, and Mr. Lightfoot. Stat. Tr. vol. i. p. 759. Hale attended as counsel for his grace, and in the conduct of that important cause was assisted by Mr. Hern and Mr. Gerard. The former indeed took

the lead, and in defence of his client “ delivered his argument “ very freely and stoutly, proving, that nothing which his “ client had either said or done, “ according to the charge, was “ treason, by any known established law of the kingdom.” This argument was not Mr. Hern’s, but Mr. Hale’s. Ib. 938, where the argument is reported at large.



“ man-kind ; the delegates of a great people sitting in judgment upon their supreme magistrate, and trying him for his misgovernment. The solicitor, in the name of the commons, represented, that Charles Stuart, being admitted king of England, and entrusted with a limited power, yet, out of a wicked design to erect an unlimited government, had traitorously levied war against the parliament, and the people whom they represented, and was therefore impeached as a public and implacable enemy to the commonwealth. After the charge was finished, the president (serjeant Bradthaw) directed his discourse to the king, and told him that the court expected his answer.

“ THE king, though long detained a prisoner, and now produced as a criminal, sustained the majesty of a monarch. With great dignity he declined the authority of the court, and refused to submit himself to its jurisdiction. He represented, that, having been engaged in treaty with his parliament, and having finished almost every article, he had expected to be brought to his capital in another manner, and to have been restored to his power, as well as to his liberty : that he could not perceive any appearance of the upper house, so essential a member of the constitution ; and had learned that even the commons, whose authority was pretended, were subdued by lawless force, and were bereaved of  
“ their

“ their liberty : that he himself was their native,  
 “ hereditary king ; nor was the whole authority of  
 “ the state, though free and united, intituled to try  
 “ him, who derived his dignity from the Supreme  
 “ Majesty of Heaven : that admitting those extra-  
 “ vagant principles which levelled all orders of  
 “ men, the court could plead no power dele-  
 “ gated by the people, unless the consent of every  
 “ individual, down to the meanest and most ig-  
 “ norant peasant, had been first obtained : that he  
 “ acknowledged without scruple, that he had a  
 “ trust committed to him, a trust most sacred and  
 “ inviolable ; he was entrusted with the liberties  
 “ of his people, and would not betray them,  
 “ by recognizing a power founded on the most  
 “ atrocious usurpation : that having taken arms,  
 “ and frequently exposed his life, in defence of  
 “ the constitution, he was willing, in this last and  
 “ most solemn scene, to seal with his blood those  
 “ precious rights, for which, though in vain, he had  
 “ so long contended : that those who arrogated a  
 “ title to sit as his judges, were born his subjects,  
 “ and born subjects to those laws which determined  
 “ that the king can do no wrong : that he was not  
 “ reduced to the necessity of sheltering himself  
 “ under that general maxim, which guards every  
 “ English Monarch, even the least deserving ; but  
 “ was able, by the most satisfactory reasons, to  
 “ justify those measures in which he had been en-  
 “ gaged : that, to the whole world, and even to  
 “ them his pretended judges, he was desirous, if  
 b 4 “ called

“ called upon in another manner, to prove the  
 “ integrity of his conduct, and assert the justice of  
 “ those defensive arms, to which, unwillingly and  
 “ unfortunately, he had recourse : but that, in or-  
 “ der to preserve an uniformity of conduct, he  
 “ must, at present, forego the apology of his in-  
 “ nocence ; left by ratifying an authority no better  
 “ founded than that of robbers and pirates, he be-  
 “ justly branded as the betrayer, instead of being  
 “ applauded as the martyr, of the constitution (*d*).”

HALE was also counsel for the duke of Hamilton (*e*), the lords Holland (*f*), Capel, and Craven : but when he stepped forth the advocate of the latter, he pleaded with such persuasive eloquence, that the very enemies of his client were charmed into admiration, and all who heard him were convinced. The attorney-general indeed so far neglected his own character, as to threaten him for

(*d*) Hume. Stat. Tr. vol. i. from folio 986 to 1044. Sir John Dalrymple slightly notices the conduct of the commons against Charles :—“ The republican and puritanical commons (says Sir John), with a democratical spirit, brought their sovereign, under the forms of justice, like a common member of the community, to a public trial, and a public execution. With the same levelling hand, they laid the peerage, the church, the parliament, and the law itself, in the dust.” Mem. Gr. Br. vol. i. p. 18.

(*e*) Mr. Chute, Mr. Hale, Mr. Parsons, and Doctor Walker, were assigned counsel for his Grace, Stat. Tr. vol. ii. p. 2. See also Dr. Burnet’s Memoirs of the Duke of Hamilton, p. 385, &c. and Clarend. Hist. vol. iii. p. 204. 209—The duke was tried by a new high court of justice, as earl of Cambridge in England.

(*f*) No party lamented the death of the earl of Holland ; his ingratitude to the king was a great stain on his memory.

appearing

appearing against government : regardless of consequences, HALE, with that becoming warmth which is the general attendant on honest confidence, answered,—“ I am pleading in defence of  
 “ laws which you are bound to maintain ; I am  
 “ doing justice to my client, and am not to be  
 “ intimidated.”

HIS legal qualifications had now rendered him eminently conspicuous, and the rectitude of his conduct had gained him universal esteem. Cromwell, seeing the extent of his practice, knowing the transcendancy of his abilities, and pleased perhaps with the boldness of his integrity, determined on advancing him to the bench. Incapable of hypocrisy, and unmoved by the honour intended him, HALE at first declined to accept the commission. Surprised at a conduct so extraordinary, Cromwell condescended to inquire his reasons for refusing so high an office. HALE candidly informed him,  
 “ that he was not satisfied about his authority, and  
 “ therefore scrupled to accept the commission.” Cromwell, who was a friend to justice, though his public conduct has been said to have been one continued violation of it, replied, “ that as he  
 “ had gotten possession of the government, he was  
 “ resolved to maintain it ; I will not” (continued the Protector, with what probability the reader will determine, for I mean not to vouch for the truth of the relation) “ be argued out of it.—It  
 “ is my desire to rule according to the laws of the  
 “ land,



“land, for which purpose I have pitched upon you; but if you won’t let me govern by red gowns, I am resolved to govern by red coats (g).”—HALE, commiserating the temper of the times, added to a reflection that justice ought, at all events, to be supported, was on maturest consideration convinced, that nothing criminal could be imputed to the unbiassed instrument of its impartial administration. This reflection, confirmed by the solicitation of his friends, induced him to yield to the proposal of Cromwell. The importunity of the republicans was equally urgent. By the promotion of HALE, whose political sentiments were widely different from their own, they affected to despise every idea of private advantage. To gain popularity, it was insinuated that their importunity arose only from a fervent zeal for the public good. “We will trust (said they) men of eminent virtue, of what persuasion soever respecting political matters.” HALE’s reverence for right still interposed itself;—he questioned the propriety of his sitting in judgment upon criminals;—conceiving it to be highly improper, if not wholly unjustifiable, to pass sentence under an authority which was derived from usurpation; however, in 1653, he accepted the commission which constituted him one of the judges of the court of common pleas. In the *rota* of criminal decision, he sat some few times on the crown side; but on

(g) I doubt whether at that time the army had any regular uniform; and if they had, that it was scarlet.

further

further confideration refused to fit there any more, becaufe, “in matters of blood, he was always to chufe the fafer fide.” The heart of a good man cannot but recoil at the thought of punifhing a flight injury with death; and he who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten for fear of hurrying the offender to that ftate in which there is no repentance, has converfed very little with mankind. “And whatever epithets of reproach or contempt this compaffion may incur from thofe who confound cruelty with firmnefs, I know not (fays Dr. Johnson) whether any wife man would wifh it lefs powerful or lefs extenfive.”

WITHIN a fhort time after his preferment, in a caufe depending before him, the jury were returned by the exprefs order of Cromwell. Affonifhed at the atrocity and incenfed at the illegality of the act, HALE, with a fpirit becoming his character, difmiffed the jury, and would not try the caufe. Hurt by the difappointment, and offended with the conduct, the Protector faid to him in anger, “You are not fit to be a judge.”—HALE modeftly answered, “It is true.”

NOTWITHSTANDING this, he continued to adminifter juftice until the death of Cromwell, when he not only refused the mourning fent for him and his domeftics, but alfo to accept the new commiffion offered him by Richard; and though all the judges

judges pressed it, and employed others to solicit him, yet he rejected every importunity, saying, "I can act no longer under such authority."

FROM this time, until the *parliament* assembled(g) which called home Charles II. he sedulously secluded himself from his profession and the world; but being now returned a member for the county of Gloucester, his privacy was in consequence disturbed;—contemplation changed into action, and the sweets of retirement gave way to the calls of his country.

AVERSE as he was from those principles which actuated the government of Cromwell, he nevertheless avoided the extremities into which the temerity of the royalists too often precipitated them. Faction and party he equally despised: nay, attached as he was to monarchy and his sovereign, he was not, on the Restoration (of which he was a considerable promoter), for receiving Charles without reasonable restrictions; conceiving this to be, of all other incidents, the most opportune to limit that prerogative which had given rise to such recent and unparalleled calamities.

WE are taught under every form of government to apprehend usurpation, either from the

(g) May, 1660.—Or *Convention*, as it came afterwards to be called, because it was not summoned by the king's writ. Burnet's Hist. oct. vol. i. p. 122.

abuse

abuse or from the extension of the executive power ; and though it be no advantage to a prince to enjoy more power than is consistent with the good of his subjects, yet this maxim is but a feeble security against the passions and follies of men. Those who are intrusted with power in any degree, are disposed, from the mere dislike of constraint, to remove opposition (*b*). Sensible of such truths, HALE moved the commons, that “ a committee “ might be appointed to look into the propo- “ sitions which had been made, and the conces- “ sions which had been offered by the late king, “ that from thence they might digest such pro- “ positions as they should think fit to be sent “ over to the king (*i*).” This motion, through the influence of general Monk, failed of success ; it shewed, however, that HALE entertained a warm regard for the public, a high respect for its laws, and that he was no friend to those opinions which tended to support the indefeasible right of prerogative. The motives which determined the fate of this motion, were the reverse of, and equally in extreme with, those which influenced the commons against Charles the First. The general opinion now seemed to condemn all jealous capitulations with the sovereign. Harassed with convulsions men ardently wished for repose, and were terrified at the mention of negotiation or delay.

(*b*) Ferguson on Civil Society. (*i*) Burnet's Hist. oct. vol. i. p. 122.

Added



Added to this, the passion for liberty, having produced such horrid commotions, began to give place to a spirit of loyalty and obedience (*k*). Why Monk should disapprove the imposition of rational conditions, is not easily to be accounted for; he seemed resolved, however, that the crown, which he intended to restore, should be conferred on the king entirely free and unincumbered (*l*). He knew not, perhaps, that liberty is never in greater danger, than when we measure national felicity by the blessings which a prince may bestow, or by the mere tranquillity which may attend an equitable administration. The sovereign may dazzle with his heroic qualities; he may protect his subjects in the enjoyment of every animal advantage or pleasure: but the benefits arising from liberty are of a different sort; they are not the effects of a virtue and of a goodness which operate in the breast of one man, but the communication of virtue itself to many; and such a distribution of functions in civil society, as gives to numbers the exercises and occupations which pertain to their nature (*m*).

CHARLES II. immediately after his restoration, came to the house of peers, and in the most earnest terms pressed an act of general indemnity; he urged not only the necessity of it, but the obliga-

(*k*) Hume.(*l*) *Id.*(*m*) Dr. Ferguson.



tion of a promise which he had formerly given; a promise which he would ever regard as sacred, since to that he probably owed the satisfaction of meeting his people in parliament.—This measure of the king, though irregular (*n*), was received with great satisfaction; and the commons, after some debate, appointed a committee to forward the generous purpose (*o*).

OUR author, then Serjeant HALE, had the honour of being nominated one of the committee (*p*): and now, in the execution of this high trust, he exerted all the powers of his mind, and all the goodness of his heart, to terminate those evils which had too long and too successfully prevailed. Prudence and humanity dictated, that the sooner the bill passed, the sooner the blessings of peace would be diffused. With an assiduity to be equalled only by his philanthropy, he framed, carried on, and supported the bill.

INDISPOSED as his manners were to that versatility of conduct which recommends to notice and preferment, yet such was his reputation, that (to use the words of Mr. Emlyn), “it was thought

(*n*) By his taking notice of a bill which depended before the houses.

(*o*) Parl. Hist. vol. ii. p. 290.

(*p*) Sir John Dalrymple observes, that “Charles privately promoted the success of the bill

of indemnity in the house of commons, and publicly checked the severity of the house of lords in their proceedings upon it.” Mem. Gr. Br. p. 21. and Macph. Hist. vol. ii. p. 35.

“ an

“ an honour to his majesty’s government to advance him to the station of lord chief baron (q).” When the earl of Clarendon notified to him the appointment, he was pleased to express himself in a peculiar manner:—“If the king” (said the chancellor) “ could have found an honefter or an abler man for the employment, he would not have advanced you to it; he prefers you, because he knows no one who so well deserves it.”

UNAMBITIOUS, diffident, and reserved, HALE studiously avoided the honour of knighthood, usually consequent on such a promotion; he declined every occasion of waiting on the king; but the chancellor one day introducing him as “ the modest chief baron,” his majesty immediately knighted him.

HE presided eleven years in the court of exchequer with such singular propriety, that he not only raised the reputation of the court, but merited and received the approbation of the public.

MURMURS were indeed heard, invidiously and industriously insinuating that he did not decide with sufficient quickness. Admitting that some

(q) Nov. 7, 1662. Vide i. Sid. 4.

circum-

circumstances might apparently have justified the imputation, yet on the most scrupulous examination it is evident, that it could not have arisen either from ignorance or neglect. Solitude alone induced him to deliberate in decision; which had this good effect, that whatever he had once determined, was seldom, if ever, heard again.

BURNET remarks, that “ nothing was more admirable in him than his patience: that he would bear with the meanest, and give every man his full scope, thinking it much better to lose time than patience. In summing up of an evidence to a jury, he would always require the bar to interrupt him, if he did mistake, and to put him in mind of it if he did forget the least circumstance: some judges (adds the bishop) have been disturbed at this as a rudeness, which he always looked upon as a service and respect done to him.” Justice, it has been said, should speedily be administered. Though the position cannot be questioned, yet is there a wise or a good man who would not prefer the decision of one judge, whose opinion, though slow, is the effect of deliberation, to that of a thousand who determine hastily, and of course hazardously? Those who think dispatch the great excellence of justice, will doubtless admire the quickness of a Turkish suit; and be inclined to prefer the determination of a Cadi, such as Shaw and Norden have de-

VOL. I. c scribed,

scribed, to the administration of justice in their own country. The speediness, as well as severity, of justice in Turkey, is openly avowed on this principle, that it is better two innocent men should die, than one guilty live. We glory in adopting the very reverse of this principle; a greater caution therefore, in conformity to the principle, necessarily produces a greater length in the enquiry (*s*).

HALE's administration of justice was not confined to the court in which he presided; he was one of the principal judges who sat in Clifford's-inn, to adjust the disputes between the landlords and their tenants, after the dreadful conflagration; and was the first who offered to accommodate the differences respecting the rebuilding of the city. In truth, the peaceable adjustment of that great undertaking was, in no small degree, owing to his care and judgment. Without detracting from the merit of the other judges, it must be acknowledged, that he was most instrumental in the completion of that beneficent design; inasmuch as he not only assisted at all the determinations, but contrived the rules by which they were accomplished (*t*).

THE

(*s*) *Æconomus*, vol. iii. p. 203.  
Sir William Temple's *Essay on*  
*Heroic Virtue*, fol. edit. p. 225.

(*t*) On the 18th September,  
1666, the parliament met, and  
immediately passed an act for  
erecting



THE following precepts (from the original under his own hand) he rigidly observed, as

“ THINGS NECESSARY TO BE CONTINUALLY HAD  
“ IN REMEMBRANCE.”

“ THAT in the administration of justice, I am  
“ entrusted for God, the king and country;  
“ therefore, that it must be done uprightly, deli-  
“ berately, resolutely.

“ THAT I rest not on my own understanding or  
“ strength, but implore and rest upon the direc-  
“ tion and strength of God.

erecting a court of judicature, and for settling all differences between landlords and tenants, with respect to houses which had been destroyed by the fire. At the same time they appointed the justices of the king's bench and common pleas, and the barons of the exchequer, to be judges of that court. These judges conducted themselves with such strict justice, that they gained the general esteem of the citizens, who, as a testimony of respect, caused their portraits to be hung up in Guildhall.—The portrait of Sir Matthew Hale was painted by one Michael Wright.

Mr. Granger enumerates the following portraits of Sir Matthew Hale; viz. Sir Matthew

Hale, Lord Chief Justice of the King's Bench; M. Wright p. G. Vertue sc. 1735; h. sh.

Mattheus Hale, miles, &c. R. White sc. a roll in his right hand; large h. sh.—A copy by Van Hove.

Sir Matthew Hale; large h. sh.—Copied from White.

Mattheus Hale, miles, &c. Van Hove sc. sitting in an elbow chair; h. sh.

Matthæus Hale, &c. Van Hove sc. sitting; 8vo.

Matthæus Hale, &c. Clarke sc. sitting; 8vo.

Lord Chief Justice Hale; small 4to. printed with the “ Sum of Religion,” in a large half-sheet. Grang. Biogr. Hist. vol. iii. 8vo. 365.



“ THAT in the execution of judgment, I carefully lay aside my own passions, and not give way to them, however provoked.

“ THAT I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.

“ THAT I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.

“ THAT I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.

“ THAT in business capital, though my nature prompt me to pity; yet, to consider that there is also a pity due to the country.

“ THAT I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment.

“ THAT I be not biased with compassion to the poor, or favour to the rich, in point of justice.

“ THAT popular, or court applause, or taste, have no influence in any thing I do, in point of distribution of justice.

“ NOT

“ NOT to be solicitous what men will say or  
“ think, so long as I keep myself exactly accord-  
“ ing to the rule of justice.

“ IF in criminals it be a measuring cast, to in-  
“ cline to mercy and acquittal.

“ IN criminals that consist merely in words,  
“ when no more harm ensues, moderation is no  
“ injustice.

“ IN criminals of blood, if the fact be evident,  
“ severity is justice.

“ To abhor all private solicitations, of what  
“ kind soever, and by whomsoever, in matters  
“ depending.

“ To charge my servants not to interpose in  
“ any business whatsoever; not to take more than  
“ their known fees; not to give any undue pre-  
“ cedence to causes; not to recommend counsel.

“ To be short and sparing, at meals, that I  
“ may be the fitter for business.”

WITH what spirit he conformed to the most es-  
sential of these rules, may be readily collected from  
the following instances.

A NOBLE duke, having a suit depending, came to him with a view to explain the circumstances which had given rise to it, that he might the better understand it when in court: the chief baron, suddenly interrupting the narration, said, "You do not deal fairly to come about such affairs, for I never receive any information of causes but in open court, where both parties are to be heard alike;" and would not suffer him to proceed. His grace departed, not a little dissatisfied, and formally made mention of it to the king; who silenced him by observing, "I verily believe he would have used me no better had I gone to solicit him in any of my own causes\*."

THE following anecdote, which some have considered as an honour to his memory, has, by others, been censured, as a reflection on his understanding; imputing that to affectation, which

<p>(u) "I remember (says Dryden) a saying of king Charles II. on Sir MATTHEW HALE (who was doubtless an uncorrupt and upright man), that his servants were sure to be cast on a trial which was heard before him; not that he</p>	<p>"thought the judge was possible to be bribed, but that his integrity might be too scrupulous, and that the causes of the crown were always suspicious when the privileges of subjects were concerned*."</p>
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\* Dedic. of Transf. from Juvenal.

evidently resulted from a strict observance of his duty. A gentleman having a cause to try before him, sent him a buck; but he would not proceed in the trial until the buck was paid for, which induced the plaintiff to withdraw his record: in which if there be not much to commend, there is surely nothing to blame.

At Salisbury, the dean and chapter, in conformity with an established custom, presented him with six sugar-loaves; he made his servants pay for them before he would try a cause in which the dean and chapter were concerned.

MELANCHOLY is the truth, that the frequency of envy renders it so familiar, that it even escapes our notice; nor do we reflect upon its turpitude, until we have felt its influence. To spread suspicion requires neither labour, courage, nor expence; it is easy for the author of a lie, however malignant, to escape detection, and infamy needs very little industry to assist its circulation. Whether HALE had excited malice by his eminence, I cannot determine; experience, no doubt, convinced him, that the mention of a name which distinction had rendered eminent, only provoked the asperity of the envious and the animosity of the malignant: that his children therefore might not indulge their credulity at the expence of

another's reputation, he with great wisdom cautions them against it in the following Letter; a letter which may with truth be deemed a valuable literary relick, and a strong proof of the attention which he paid to the morals and the manners of his children.

A LETTER FROM SIR MATTHEW HALE TO HIS  
CHILDREN, JANUARY 19, 1660.

CHILDREN,

I THANK God I came well to Farrington this Saturday about five of the clock, and because I have some leisure time at my inn, I could not spend that time more to my own contentment, and your benefit, than by my letter to give you all good counsel; the subject whereof at this time shall be concerning *speech*; because much of the good or evil that befalls persons, doth occasionally happen by the well or ill managing of that part of humane conversation. I shall, as I have leisure and opportunity at other times, give you my directions concerning other subjects. First, as concerning the former, observe these directions:

OBSERVE and mark as well as you may, what is the temper and disposition of those persons, whose speeches you hear; whether they be grave, serious, sober,



sober, wise, discreet persons : if they be such, their speeches commonly are like themselves, and well deserve your attention and observation. But if they be light, impertinent, vain, passionate persons, their speech is for the most part according, and the best advantage that you will gain by their speech, is but thereby to learn their dispositions, to discern their failings, and to make yourselves the more cautious both in your conversation with them, and in your own speech and deportment, for in the unseemliness of their speech you may better discern and avoid the like in yourselves.

If any person, that you do not very well know to be a person of truth, sobriety, and weight, relate strange stories, be not too ready or easy to believe them, nor report them after him ; and yet, unless he be one of your familiar acquaintance, be not too forward to contradict him ; or if the necessity of the occasion require you to declare your opinion of what is so reported, let it be modestly and gently, not too bluntly or coarsely ; by this means, on the one side you shall avoid being abused by your too much credulity ; on the other side, you shall avoid quarrels and distaste.

If any man speak any thing to disadvantage or reproach of one that is absent, be not too ready to believe it, only observe and remember it ; for it may be it is not true, or it is not all true, or  
some

some other circumstances were mingled with it, which might give the business reported a justification, or at least an allay; an extenuation or a reasonable excuse: in most actions, if that which is bad alone, or seems to be so, be reported, omitting that which is good, or the circumstances that accompany it, any action may be easily misrepresented; be not too hasty therefore to believe a reproach, 'till you know the truth, and the whole truth.

IF any person report unto you some injury done to you by another, either in words or deeds, do not be over-hasty in believing it; nor suddenly angry with the person so accused; for it is possible it may be false or mistaken; and how unseemly a thing will it be, when your credulity and passion shall perchance carry you, upon a supposed injury, to do wrong to him that hath done you none; or at least, when the bottom and truth of the accusation is known, you will be ashamed of your passion. Believe not a report till the accused be heard; and if the report be true, yet be not transported either with passion, hasty anger, or revenge, for that will be your own torment and perturbation. Even when a person is accused or reported to have injured you, before you give yourself leave to be angry, think with yourself, Why should I be angry before I am certain it is true? or, if it be true, How can I tell how much I should be angry, till I know

know the whole matter? Though it may be he hath done me wrong, yet possibly it is misrepresented, or it was done by mistake, or it may be he is sorry for it: I will not be angry till I know there be cause, and if there be cause, yet I will not be angry till I know the whole cause; for till then, if I must be angry at all, yet I know not how much to be angry; it may be it is not worth my anger, or if it be, it may be it deserves but a little. This will keep your mind and carriage upon such occasions in a due temper and order; and will disappoint malicious or officious tale-bearers.

IF a man whose integrity you do not very well know, makes you great and extraordinary professions and promises, give him as kind thanks as may be, but give not much credit to it: cast about with yourself what may be the reason of this wonderful kindness; it is twenty to one but you will find something that he aims at, besides kindness to you; it may be he hath something to beg or buy of you, or to sell you, or some such bargain that speaks out at last his own advantage, and not yours; and if he serve his turn upon you, or if he be disappointed, his kindness will grow cool.

IF a man flatter and commend you to your face, or to one that he thinks will tell you of it,  
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it is a thousand to one either he hath deceived and abused you some way, or means to do so. Remember the fable of the fox commending the singing of the crow, when she had somewhat in her mouth that the fox liked.

If a person be cholerick, passionate, and give you ill language, remember, rather to pity him than to be mov'd into anger and passion with him, for most certainly that man is in a distemper and disorder; observe him calmly, and you shall see in him so much perturbation and disturbance, that you will easily believe he is not a pattern to be imitated by you, and therefore return not choler for anger; for you do but put yourself into a kind of frenzy because you see him so. Be sure you return not railing, reproaching, or revileing, for revileing; for it doth but kindle more heat, and you will find silence, or at least very gentle words, the most exquisite revenge of reproaches that can be; for either it will cure the distemper in the other, and make him see and be sorry for his passion, or it will torment him with more perturbation and disturbance. But howsoever, it keeps your innocence, gives you a deserved reputation of wisdom and moderation, and keeps up the serenity and composure of your mind; whereas passion and anger do make a man unfit for any thing that becomes him as a man, or as a Christian.

SOME

SOME men are excellent in knowledge of husbandry, some of planting, some of gardening, some in the mathematicks, some in one kind, some in another; in all your conversation, learn as near as you can wherein the skill and excellence of any person lies, and put him upon talk of that subject, and observe it, and keep it in memory or writing; by this means you will glean up the worth and excellence of every person you meet with, and at an easie rate put together that which may be for your use upon all occasions.

CONVERSE not with a liar or a swearer, or a man of obscene or wanton language; for either he will corrupt you, or at least it will hazard your reputation to be one of the like making; and if it doth neither, yet it will fill your memory with such discourses, that will be troublesome to you in after time, and the returns of the remembrance of the passages which you long since heard of this nature, will haunt you, when your thoughts should be better imployed.

Now as concerning your own speech, and how you are to manage it, something may be collected out of what goes before; but I shall add some things else.

LET your speech be true; never speak any thing for a truth, which you know or believe to be faulse:  
it



it is a great sin against God, that gave you a tounge to speak your offence against humanity itself, for where there is no truth there can be no safe society between man and man. And it is an injury to the speaker, for, besides the base disreputation it casts upon him, it doth in time bring a man to that baseness of mind, that he can scarce tell how to tell truth or to avoid lying, even when he hath no colour of necessity for it; and it comes to such a pass, that as another man cannot believe he tells a truth, so he himself scarce knows when he tells a lye: and observe it, a lye ever returns with discovery and shame at the last.

As you must be careful not to lye, so you must avoid coming near it; you must not equivocate; you must not speak that absolutely which you have but by hearsay or relation; you must not speak that as upon knowledge, which you have but by conjecture or opinion only.

LET your words be few, especially when your betters, or strangers, or men of experience, or understanding, are in place; for you do yourself at once two great mischiefs: *first*, you betray and discover your own weakness and folly; *secondly*, you rob yourself of that opportunity which you might otherwise have to gain knowledge, wisdom, and experience, by hearing those that you silence by your impertinent talking.

BE not over-earnest, lowd, or violent in talking, for it is unseemly; and earnest and lowd talking make you overshoot and lose your business: when you should be considering and pondering your thoughts, and how to express them significantly, and to the purpose, you are striving to keep your tongue going, and to silence an opponent, not with reason but with noise.

BE careful not to interrupt another in his talk; hear him out; you will understand him the better, and be able to give him the better answer; it may be, if you will give him leave, he will say somewhat more than you have yet heard, or well understood, or that which you did not expect.

ALLWAYS before you speak, especially where the business is of moment, consider beforehand; weigh the sense of your mind, which you intend to utter; think upon the expressions you intend to use, that they be significant, pertinent, and unoffensive; and whereas it is the ordinary course of inconsiderate persons to speak their words, and then to think, or not to think till they speak; think first and speak after, if it be in any matter of moment or seriousness.

BE willing to speak well of the absent, if you do not know they deserve ill: by this means you shall make yourself many friends, and sometimes  
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an undeserved commendation is not lost to the party to whom it is given. I have known some men that have met with an undeserved commendation, out of shame of being worse than they have been reported, secretly to take up practises answerable to their commendation, and so make themselves as good as they were reported.

BE sure you give not an ill report to any that you are not sure deserves it. And in most cases, though a man deserves ill, yet you should be sparing to report him so; in some cases indeed you are bound, in honesty and justice, to give that account concerning the demerit or default of a person that he deserves: as namely, when you are called to give testimony for the ending of a controversie, or when the concealing of it may harden and encourage a person in an evil way, or bring another into danger; in such cases, the very duty of charity binds you to speak your knowledge, nay your probable fear or suspicion of such a person, so it be done for prevention of greater inconveniencies and in love; and especially if the discovery be made to a person that hath the superintendence, care, or authority over the person complained of, for this is an act of love and duty. But for any person maliciously, busily, and with intent to scandalise another, to be whispering tales and stories to the prejudice of others, this is a fault: if you know any good of any person, speak it as you have opportunity;

portunity : if you know any evil speak it, if it be really and prudently done for the good of him, and the safety of others ; otherwise rather chuse to say nothing, than to say any thing reproachfully, maliciously, or officiously, to his prejudice.

Avoid swearing in your ordinary communication, unless called to it by the magistrate ; and not onely the grosser oaths, but the lesser : and not onely oaths, but imprecations, earnest and deep protestations : as you have the commendable example of good men to justify a solemn oath before a magistrate, so you have the precept of Our Saviour forbidding it otherwise.

Avoid scoffing, and bitter and biting jeering and jesting ; especially at the condition, credit, deformity, or natural defects of any person ; for these leave a deep impression, and are a most apparent injustice ; for were you so used, you would take it inwardly and amiss ; and many times such an injury costs a man dear, when he little thinks of it.

Be very careful that you give no reproachful, bitter menacing, or spiteful words to any person, nay not to servants or other persons of an inferior condition ; and that upon these considerations : 1. There is not the meanest person but you may stand in need of him in one kind, or at some time or another : good words make friends, bad words make enemies ; it is the best prudence in the

world to make as many friends as honestly you can, especially when it may be done at so easie rate as a good word; and it is the greatest folly that can be, to make an enemy by ill words, which do not at all any good to the party that useth them.

2. Ill words provoke ill words again, and commonly such ill words as are gained by such a provocation, especially of an inferiour, stick closer, and wound deeper, than such as come unprovoked by ill language, or from an equal. 3. Where faults are committed, they may, and by a superiour must, be reprov'd; but let it be done without reproaches, or bitterness; otherwise it loseth its due end and use, and instead of reforming the offence, exasperates the offender, and makes him worse, and gives him the cudgel to strike againe; because it discovers your own weakness when you are reprehending another, and lays you justly open to his reproof, and makes your own but scorn'd and disesteemed. I press this the rather, because most ordinarily ill language is the folly of children, and of weak and passionate people.

If there be occasion for you to speak in any company, always be careful if you speak at all, to speak latest, especially if strangers are in company; for by this means you will have the advantage of knowing the sence, judgment, temper, and relations of others, which may be a great light and help to you in ordering your speech, and you will better know the inclination of the company, and  
speak



ſpeak with more advantage and acceptance, and with more ſecurity againſt giving offence.

BE careful that you commend not yourſelves; it is the moſt unuſeful and ungrateful thing that can be: you ſhould avoid flattery from others, but eſpecially decline flattering of yourſelves; it is a ſign your reputation is ſmall and ſinking, if your own tongues muſt be your flatterers or commend-ers, and it is a fulſom and unpleaſing thing for others to hear it.

ABHOR all foul, unclean and obſcene ſpeeches; it is a ſign that the heart is corrupt; and ſuch kind of ſpeeches will make it worſe; it will taint and corrupt yourſelves and thoſe that hear it, and brings diſreputation to thoſe that uſe it.

NEVER uſe any profane ſpeeches, nor make jeſts of ſcripture-expreſſions; when you uſe the names of God or Chriſt, or any paſſages or words of the holy ſcripture, uſe them with reverence and ſeriouſneſs, and not lightly or ſcurrilouſly; for it is a taking of the name of God in vain.

IF you hear of any unſeemly expreſſions uſed in religious exerciſes, you muſt be careful to forget and not to publiſh them; or if you at all mention hem, let it be with pity and ſorrow, not with de-riſion or reproach.

Do not upbraid any, or deride any man for a pious, strict, or religious conversation; for if he be sincere, you dishonour God and injure him: if he be an hypocrite, yet it is more than you know; or if you know him to be such, yet his external piety and strictness is not his fault, but his dissimulation and hypocrisy; and though his hypocrisy be to be detested, external piety and religion is to be commended, not derided.

HAVE as little conversation as is possible with hereticks, or persons obstinately perverted on matters of religion; as Papists, Quakers, Anabaptists, Antinomians, Enthusiasts, and the like: but especially converse not with them on matters of religion; for instead of converting them by your persuasions to the truth, you shall but harden them the more, and endanger yourself. They are to be dealt with all in these matters onely by persons of great abilities; for a perverted, corrupted mind, or obstinate spirit, carries in it a contagion, as infectious and much more dangerous than the plague in the body, where their opinions meet with a young opponent.

AND thus, children, as the time and my remembrance would give me leave, I have set down some observations concerning this subject, for your direction and practise; what is wanting you may abundantly supply by reading the wise counsel of Solomon, in his book of Proverbs. Read these  
my

my directions often; think of them seriously, and practise them diligently; though they seem but dry and ordinary things, yet you will find them useful in your conversation, which will be every day more evident unto you, as your judgment, understanding and experience increase.

I HAVE but little more to write at this time, but to wish and command you to remember my former counsels, that I have often given you. Begin and end the day with private prayers to God, upon your knees; read the scriptures often and seriously; be attentive to the publick worship of God in the church; keep yourselves still in some good employment, for idleness is the devil's opportunity, and the nursery of vain and sinful thoughts, which corrupt the mind, and disorder the life.

LET the girls take care of such business of my family as is proper for them; and their recreation may be walking abroad in the fields in fair or frosty mornings; some work with their needles; reading of history or herbals; setting of flowers or herbs; practising of their musick, and such innocent and harmless exercises. Let the boys be diligent at their books, and when they have performed their tasks, I do not deny them such recreations as may be healthy, safe, and harmless.

BE you all kind and loving one to another; honouring your minister; not bitter nor harsh to

my servants. Be respectful to all. Bear my absence patiently, cherefully and faithfully. Do all things as if I were present among you and beheld you, for you have a greater Father than I am, that always and in all places beholds you, and knows your hearts and thoughts: study to requite the love and care and expence of your father for you, with dutifulness, observance and obedience to him; and account it an honour, that God hath given you an opportunity in my absence, by your care, faithfulness and industry, to pay some part of that debt, that by the laws of nature and gratitude you owe unto me. Be frugal in my family; but let there be no want. Provide conveniently for the poor that come to my door. And I pray God to fill all your hearts with his grace, fear and love; and to let you see the advantage and comfort of serving him; and his blessing, and presence, and comfort, and direction, and providence be with you and over you all! I am

Your ever loving father,

MATTHEW HALE.

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On the 18th of May 1671, Sir Matthew Hale was promoted to the dignity of lord chief justice of England.—Within five years from this his last promotion, he was attacked by the disorder of which he died. From the first moment of his illness, he visibly and hastily declined; and tho' so debilitated that he could scarce, even when supported, walk, much less endure the fatigue of his profession,  
yet



yet with painful industry he pertinaciously discharged the different functions of his high office.

HIS disorder being increased by application, he at length resolved to retire from the labours of his profession (a profession which few have strength enough to bear, and which none can bear long), and therefore solicited the acceptance of his resignation. The king, unwilling to comply with the requisition, was desirous that he should continue chief justice, on condition that he would transact in his chamber as much of the business as he possibly could. He declined the offer; adding, "I cannot with a good conscience continue in office, since I am no longer able to discharge the duty belonging to it." His majesty, not well knowing how to deny the request, delayed, however, to comply with it; and the chancellor, tho' often requested by Sir Matthew, would not move the king to accept his resignation. Thus situated, Sir Matthew on the 21st of February 1675-6, went before a master in chancery, with a written instrument drawn and engrossed by himself, which he there formally sealed and delivered, requiring it might be enrolled: he afterwards produced the original to the chancellor, resigning his office in the following manner:—"Omnibus Christi fidelibus ad quos præsens scriptura pervenerit, Mathæus Hale, miles, capitalis justiciarius domini regis ad placita coram ipso rege tenenda assignatus, salutem in Domino sempiternam: Noveritis



“ me præfatum Matthæum Hale militem, jam  
 “ senem factum, et variis corporis mei senilis mor-  
 “ bis et infirmitatibus diuè laborantem et adhuc  
 “ detentum, hâc chartâ meâ resignare, et sursum  
 “ reddere serenissimo domino nostro Carolo secun-  
 “ do, Dei gratiâ Angliæ, Scotiæ, Franciæ, et Hi-  
 “ berniæ, regi, fidei defensori, &c. prædictum  
 “ officium capitalis justiciarii ad placita coram ipso  
 “ rege tenenda, humillimè petens quòd hoc scrip-  
 “ tum irrotaletur de recordo. In cujus rei testi-  
 “ monium huic chartæ meæ resignationis, sigillum  
 “ meum opposui, dat’ vicesimo primo die Febru-  
 “ arii, anno regni dict’ dom, regis nunc vicesimo  
 “ octavo.”

THIS he did to testify (as himself asserted) not  
 only his concurrence in the removal, but to ob-  
 viate an objection, that a chief justice, being placed  
 by writ, was not removeable at pleasure, as judges  
 by patent were (\*),

To those who are unacquainted with our history,  
 it may seem strange, but it is no more so than true,  
 that the judges were formerly dependent on the  
 caprice of the crown. Prerogative, no doubt,

(\*) 2. Inst. 26. 4. Inst. 75. “ and laborious, and whose  
 Cro. Car. 1.—The Earl of “ manners rendered them plea-  
 Mansfield, “ whose conspicuous “ sant and respectable”—after  
 “ and exalted talents conferred having been thirty-two years  
 “ dignity upon the profession, chief justice of the king’s-bench,  
 “ whose enlightened and regu- resigned his office in a similar  
 “ lar administration of justice manner. See *Ann. Reg.* for  
 “ made its duties less difficult 1788, p. 241.

thought

thought it necessary, but the subject found it partial and oppressive. Before the close of the seventeenth century, and anterior to the glorious Revolution, men of pliant dispositions were raised to the bench, while those who distributed justice were removed:—even-handed justice gave way to wicked policy;—objects the most precious were by vicious constructions, without ceremony and without fear, sacrificed by those whose duty it was to protect and to preserve them. Sad and melancholy must have been the prospect! for when the channels of public justice are corrupted, when justice itself is converted into the means of revenge, political misery is arrived at its height. From the numerous instances which might be educed in support of the assertion, the following one is sufficient to establish it beyond doubt or contradiction. In the year 1683, on the trial of Lord Russell, Jeffreys, in his speech to the jury, turned the untimely fate of Essex into a proof of the conspiracy in which he and Russell had been engaged. Pemberton, who presided as chief justice, behaved to the prisoner with a candour and decorum seldom found in the judges of that reign, or the succeeding one. But before Sidney was brought to his trial, Pemberton was removed from the head of the King's Bench, and even from the privy council, and Jeffreys put in his place (y), in order by the

(y) Jeffreys did not immediately succeed Sir Francis Pemberton, whose immediate successor was Sir Edmund Saunders, a man of too extraordinary a complexion to be passed over

the fierceness of his manners to cope with a man, the vigour of whose spirit was known throughout Europe (2),

In the year 1691, a bill passed both houses to make the salaries and offices of the judges for life; but the king, even at that great æra of liberty, refused his assent, "leaving room for a succeeding monarch to give unasked to the wishes of his people what William refused to their prayers." However, to maintain the dignity and independence of the judges, it was soon after enacted, that their commissions should be made (not, as formerly, *durante bene placito*, but) *QUAMDIU BENE*

over in silence. He was originally a strolling beggar about the streets, without either known parents or relations. He came often to beg scraps at Clement's Inn, where he was taken notice of for his uncommon sprightliness; and as he expressed a strong inclination to learn to write, one of the attorney's clerks taught him, and soon qualified him for an hackney-writer. He took all opportunities of improving himself, by reading such books as he borrowed of his friends; and in the course of a few years became an able attorney, and a very eminent counsel. His practice in the court of King's-Bench was exceeded by none: his art and cunning were equal to his knowledge; and he carried many a cause by laying snares. If he was detected, he

was never out of countenance, but evaded the matter with a jest, which he had always at hand. He was much employed by the king against the city of London, in the business of the *quo warranto*. His person was as heavy and ungain as his wit was alert and sprightly. He is said to have been "a mere lump of morbid flesh:" the smell of him was so offensive, that people usually held their noses when he came into court. One of his jests on this occasion was, that "none could say he wanted issue, for he had no less than nine in his back." Sir George Jeffreys succeeded him September 29th, 1683. Grang. Biog. Hist. Vol. III. oct. p. 367.

(2) Dalrym. Mem. Gr. Br. p. 91, 95.

SE GEßSERINT;—their salaries were also ascertained and established, and their removal declared lawful on the address of both houses of parliament, 13. Will. III. c. 2. (a) This law has been since improved. His present majesty in the beginning of his reign (b) declared from the throne, that “he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown;” and therefore earnestly recommended to parliament, that the judges might be continued in their offices DURING THEIR GOOD BEHAVIOUR, NOTWITHSTANDING ANY DEMISE OF THE CROWN. This the parliament immediately took into consideration, and, with all possible dispatch, passed a law in every respect conformable with the recommendation (c).

CHARLES, wearied with applications, at length, but with the greatest reluctance, accepted Sir Matthew’s resignation; at the same time assuring him, that “he should still look on him as his oracle, and have recourse to his advice when his health would permit, and that he should con-

(a) Charles the first, at the request of his parliament, instead of the patents during pleasure, gave all the judges patents

during their good behaviour. May, p. 107.

(b) March 3, 1761. See *Ann. Reg.* for 1761. p. 243.

(c) 1. Geo. 3. c. 23.



"tinue his salary during life." This instance of beneficence exceeding Sir Matthew's opinion of his own deserts, he wrote to the lord treasurer, requesting that his salary might be continued only during pleasure ; but the king insisted on bestowing it for life, and it was of course so granted.

SIR Richard Rainsford, who was but a secondary character in his profession, had the disadvantage of succeeding Sir Matthew, who was confessedly at the head of it. The merit of Rainsford, eclipsed by the superior lustre of his predecessor, appeared to be much less than in reality it was.—Let it not however be forgotten, that he as much excelled Sir William Scroggs, who succeeded him, in point of integrity, as he was below Sir Matthew Hale in point of learning. When the commission was delivered to Rainsford, the chancellor reminded him—that the very labours of the place, the weight and fatigue which attended it, were no small discouragements; "for," continued the chancellor, "what shoulders may not justly fear the burthen, which made him stoop who went before you?" "Yet I confess, you have a greater discouragement than the mere burthen of the place, in the inimitable example of your predecessor: a chief of indefatigable industry, invincible patience, exemplary integrity and magnanimity, and so absolute a master in the science of law."



To this encomium chief justice Rainsford answered, "I have been witness to the greatness of his learning, which charmed his auditors to reverence and attention. He is a person of whom I may boldly say, that as former ages cannot shew any superior, so I am confident succeeding times will never shew an equal. These considerations, heightened by what I have heard from your lordship, make me anxious how I shall succeed so good, so great a man; one who will be eminently famous to all posterity."

THE hope that relaxation would insure repose, proved flattering and delusive. In truth, Sir Matthew Hale's disorder rather increased than diminished from the time of his resignation; inasmuch that within a short time afterwards his recovery became impossible. He, nevertheless, supported himself with uncommon equanimity. In the excruciating moments of pain he forbore complaint, and when at his devotions was fervent and composed. The divine who attended, acquainted him that the sacrament was to be administered at the church; but that as he could not (the pressure of disease considered) attend, it should be administered to him in his own house. "No," (exclaimed Sir Matthew) my heavenly Father has prepared a feast for me, and I will go to my Father's house to partake of it!" He was carried thither, where, with the other communicants, he participated of the sacrament.

HIS

HIS whole powers were now engrossed by the contemplation of another state, and all conversation was now tedious which had not some tendency to disengage him from human avocations, and expand his prospects into futurity. That he had some unaccountable presage of his death, is (if credit may be given to episcopal authority) unquestionably true. But an assertion of this kind; in an age liberal and enlightened like the present, may appear problematical.—Burnet has been bold enough to publish it :—few perhaps will give credence to the learned bishop; and tho' every one may be allowed to be somewhat sceptical on the subject, yet nothing could justify the suppression of so singular an anecdote.

“ HE had (says Burnet) some secret unaccountable presages of his death; for he said, that if he did not die on such a day (which fell to be the 25th of November), he believed he should live a month longer; and he died that very day month.”

HENRY the Great had a similar prescience; which the Duke of Sully, who cannot be thought either a credulous or a weak man, has noticed in a particular manner (*d*). Other instances, equally cogent, might no doubt be selected; but in such points, it is better to rest in the prudent state of

(*d*) Mem. de Sul. tom. iii. 4to. 226.

neutrality, without engaging assent to either the one side or the other. Such an hovering faith as this, which refuses to settle upon any determination, is absolutely necessary in a mind that is careful to avoid errors and prepossessions. When the arguments press equally on both sides in matters which are indifferent, the safest method is to give up ourselves to neither (*e*).

CONSONANT with the prediction, if such a prediction ever was declared, all that was mortal of Sir Matthew Hale expired on the 25th of December, 1676.

His remains were deposited in the cemetery of Alderly, among those of his ancestors. This was done in conformity with his own sentiments. He did not approve of the mode of burying in churches; because, as he was often heard to declare, "churches are for the living, and church-yards "for the dead." On his monument is this inscription:—

HIC INHUMATUR CORPUS  
MATTHEI HALE, MILITIS,  
ROBERTÆ HALE, ET JOANNÆ  
UXORIS EJUS, FILII UNICI;  
NATI IN HAC PAROCHIA DE ALDERLY,  
PRIMO DIE NOVEMBRIS;

A. D. 1609.

DENA.

(*e*) *Spectator*, No. cxvii.

DENATI VERO IBIDEM  
VICESIMO QUINTO DIE DECEMBRIS,

A. D. 1676.

ÆTATIS SUÆ LXVII. (f)

VIRTUES which once were envied, because they eclipsed those of others, can no longer obstruct reputation; no one can now have any interest in the suppression of his praise.

SIR Matthew Hale was of a middle stature, strong and well-proportioned; his countenance engaging; his conversation affable and entertaining; his elocution easy and persuasive; his temper warm, open and generous; affectionate to his family; sincere to his friends. However engaged in the service of his country, he neglected not the minds and manners of his children. To form their manners and direct their talents; to promote in them the practice of virtue and of piety—to shield them from imprudence, indigence, and misfortune, were the important objects of his instruction (g).

HE seemed from his youth to have acquainted himself with wisdom and with knowledge; his virtue was not inferior to his learning; and as humility always accompanied the former, modesty

(f) Though there be the utmost simplicity in the words of this inscription, yet there appears a certain air of dignity in them, owing to the fact that

compose them, which are all of the most generous quality.

MASON.

(g) See the letter to his children, ante.

was ever attendant on the latter; and notwithstanding the variety of his avocations, he daily pressed nearer to perfection by a devotion, which tho' elevated was rational, and tho' regular was warm.

In his profession, his judgment was clear, his opinion was authority; and notwithstanding he conscientiously discharged the duties of his profession, he at the same time disregarded the profits which resulted from it. When at the bar, nothing could induce him to prostitute his abilities; and tho' while there civil war raged with all the violence of contention, yet he not only preserved his integrity, but lived in ease and security. Actuated by the example of Pomponius Atticus, he walked thro' times of the most turbulent distraction uncensured, unhurt.— On the bench he reign'd “a pure intelligence.” There he was all patience; and tho' the temper of the times too often made innovations in the profession, yet he never gave way to injustice, however formidable. Nothing could alarm, nor anything allure him. Looking forwards to the lasting, incorruptible judgment of posterity, without fear, and above temptation, he became a shield to his fellow-citizens, and a support to his profession, and the state. He held equity to be, not only part of the common law, but also one of its principal grounds; for which reason he reduced



it to principles, that it might be studied as a science (*b*).

His abilities were so extensive, that it is almost incredible that one man, in no great space of time, should acquire such variety of knowledge; but when we reflect that his parts were lively, and his apprehension quick; that his memory was retentive, his judgment sound, and his application indefatigable; the mystery is untavelled, and admiration increases, as incredulity passes away.

With such virtues and such abilities, had he been insensible to the applause which was justly and liberally bestowed upon him, it might have been adduced either as an instance of weakness or affectation: on the contrary, he had a becoming sense of the esteem in which he was held, attended with that self-approbation which ever accompanies the accomplishment of worthy actions. For this, however, he is represented as a vain person by Mr. ROGER NORTH (*i*), who by endeavouring to depreciate an exalted, established character, has only degraded his own.

(*b*) See his Analysis.

(*i*) In the reign of Charles II. North was a barrister of distinguished abilities, and in the succeeding reign was made Attorney General. He was a near relation of the Lord Keeper Guildford, with whom he chief-

ly spent the active part of his life. He was author of the lives of Francis Lord Guildford, Lord Keeper; of Sir Dudley North; and of Dr. John North, Master of Trinity College, Cambridge.

THOUGH

THOUGH religion be the most animating persuasion which the mind of man can embrace—tho' it gives strength to our hopes and stability to our resolutions—tho' it subdues the insolence of prosperity, and draws out the sting of affliction; yet such was the profligacy of the reign of Charles the second—so far removed from sound policy and good manners, that, at this period of ease and politeness, religion was not only grossly neglected, but was daily exhibited as an object for the exercise of ridicule. To lessen the veneration that is due to religion, is a kind of zeal which no epithet is sufficient to stigmatize;—it is attacking the strongest hold of society, and attempting to destroy the firmest guard of human security. So alarming was this advance of impiety to Sir Matthew, that he often deplored it with unaffected sorrow.—Were it necessary to evince his abhorrence of it, I might content myself with appealing to the bright example of his life; but, however sufficient that might be for the purpose, it would yet be doing great injustice to his memory not to mention, that he employed some time in elegant instructive disquisition on the most interesting topics of the christian religion. Minutely observant of the rituals of devotion, he was, perhaps, singular in his deportment; but he for a long time concealed the consecration of himself to the stricter duties of religion, lest by some adventitious action he should bring piety into disgrace. In truth, he taught the theory of christianity by his precepts, and the

e 2

practice

practice by his example. The faith which influenced his own actions, he religiously communicated to others; he improved devotion where he found it, and kindled it where he found it not. May those who study his writings, imitate his life; and those who endeavour after his knowledge, aspire likewise to his piety!

By being ingenuous, he not only secured his independency, but raised himself above flattery or reproach, above menace or misfortune. Thus the rectitude of his conduct, added to the greatness of his abilities and the ease of his deportment, not only gained him universal respect, but rendered him more conspicuous than any of his contemporaries.

## P O S T S C R I P T.

**I**T is laudable to respect such as are nobly descended, not merely from gratitude to those who have benefited society, but that others may be animated by their example. Laudable as such an attention most unquestionably is, yet as it is an honour from courtesy, and not of right, it must be received and cannot be demanded. Burnet, speaking of Sir MATTHEW HALE, says, "in after time" it is not to be doubted but it will be reckoned "no small honour to derive from him;" which induced me to subjoin the succeeding narrative.

HALE was twice married. His first wife was Ann, daughter of Sir Henry Moore, of Fawley in Berkshire, grand-child to Sir Francis Moore, serjeant at law. By her he had ten children (*k*).

His eldest son (Robert) married Frances, daughter of Sir Frances Chock, of Avington, in Berkshire; by whom he had five children; Matthew, Gabriel, Ann, Mary, and Frances.

His second son (Matthew) married Ann, daughter of Mr. Matthew Simmonds, of Hilsley in Gloucestershire; by whom he had one son, named Matthew.

(*k*) Four of them died young.



HIS third son (Thomas) married Rebekah, daughter of Mr. Christian le Brune, a Dutch merchant; but died without issue.

HIS fourth son (Edward) married Mary, daughter of Edmond Goodyere, Esq. of Heythorp, in Oxfordshire; by whom he had two sons and three daughters.

HIS eldest daughter (Mary) married Edward Alderly, Esq. of Innishannon in the county of Cork in Ireland, who dying, left her with two sons and three daughters. She afterwards married Edward Stevens, Esq. of Cherrington in Gloucestershire.

HIS youngest daughter (Elizabeth) married Edward Webb, Esq. barrister at law; she died, leaving two children.

HIS second wife was Ann, the daughter of Mr. Joseph Bishop of Fawley, in Berkshire, by whom he had not any issue.

It may not be improper also to mention, that Sir Matthew gave to the society of Lincoln's Inn the most valuable of his manuscripts. As they are principally professional, and perhaps unknown to many, no apology is necessary for enumerating them, or transcribing that part of the will which relates to the bequest.

“ITEM,



"ITEM, as a testimony of my honour and re-  
 "spect to the society of Lincoln's-Inn, where I had  
 "the greatest part of my education, I give and  
 "bequeath to that honourable society, the several  
 "manuscript books contained in a schedule an-  
 "nexed to my will: they are a treasure worth  
 "having and keeping, which I have been near  
 "forty years in gathering with very great industry  
 "and expence. My desire is, that they be kept  
 "safe and all together, in remembrance of me;  
 "they were fit to be bound in leather and chained,  
 "and kept in archives: I desire they may not be  
 "lent out or disposed of: only if I happen here-  
 "after to have any of my posterity, of that society,  
 "that desires to transcribe any book, and give  
 "very good caution to restore it again in a pre-  
 "fixed time, such as the benchers of that society  
 "in council shall approve of; then, and not  
 "otherwise, only one book at one time may be  
 "lent out to them by the society; so that there be  
 "no more but one book of those books abroad  
 "out of the library at one time. They are a trea-  
 "sure that are not fit for every man's view; nor  
 "is every man capable of making use of them;  
 "only I would have nothing of these books  
 "printed, but entirely preserved together for the  
 "use of the industrious learned members of that  
 "society."

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SIR MATTHEW HALE. lxi

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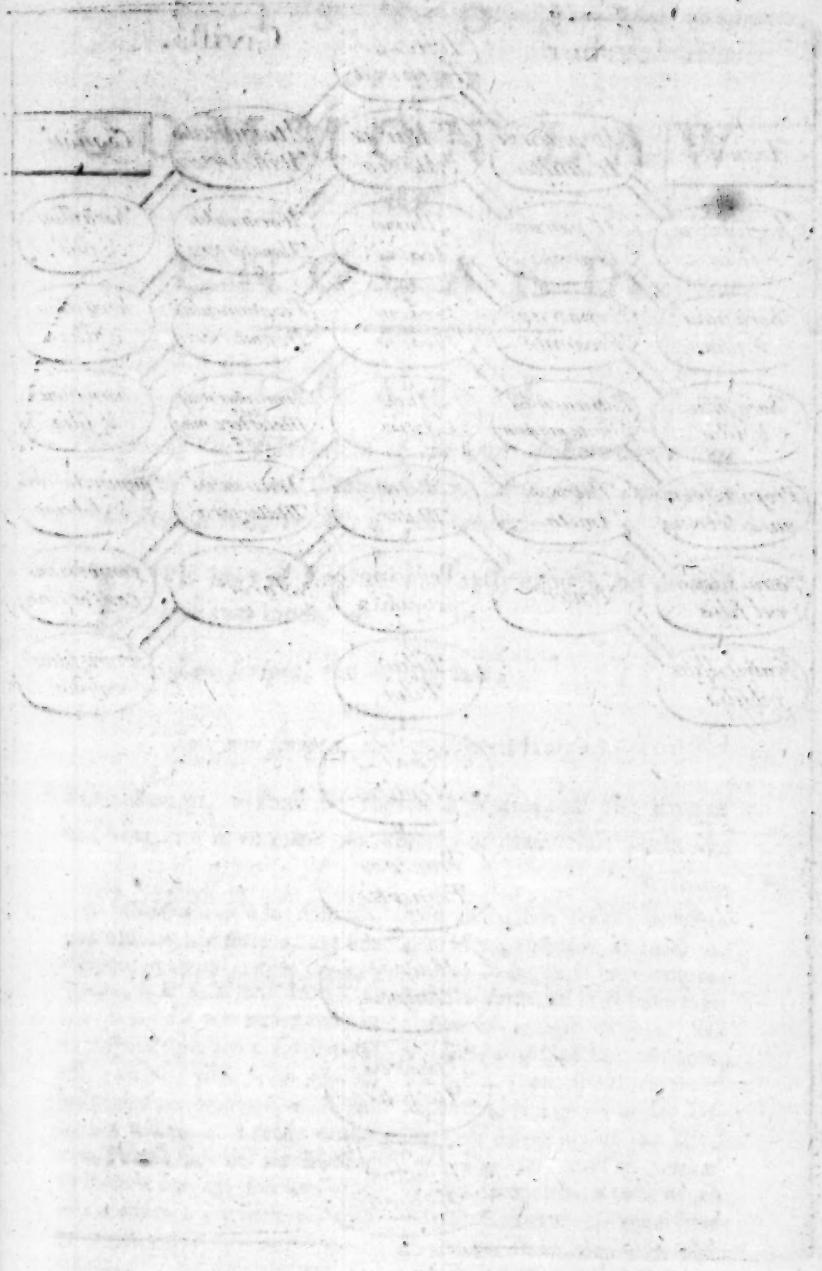
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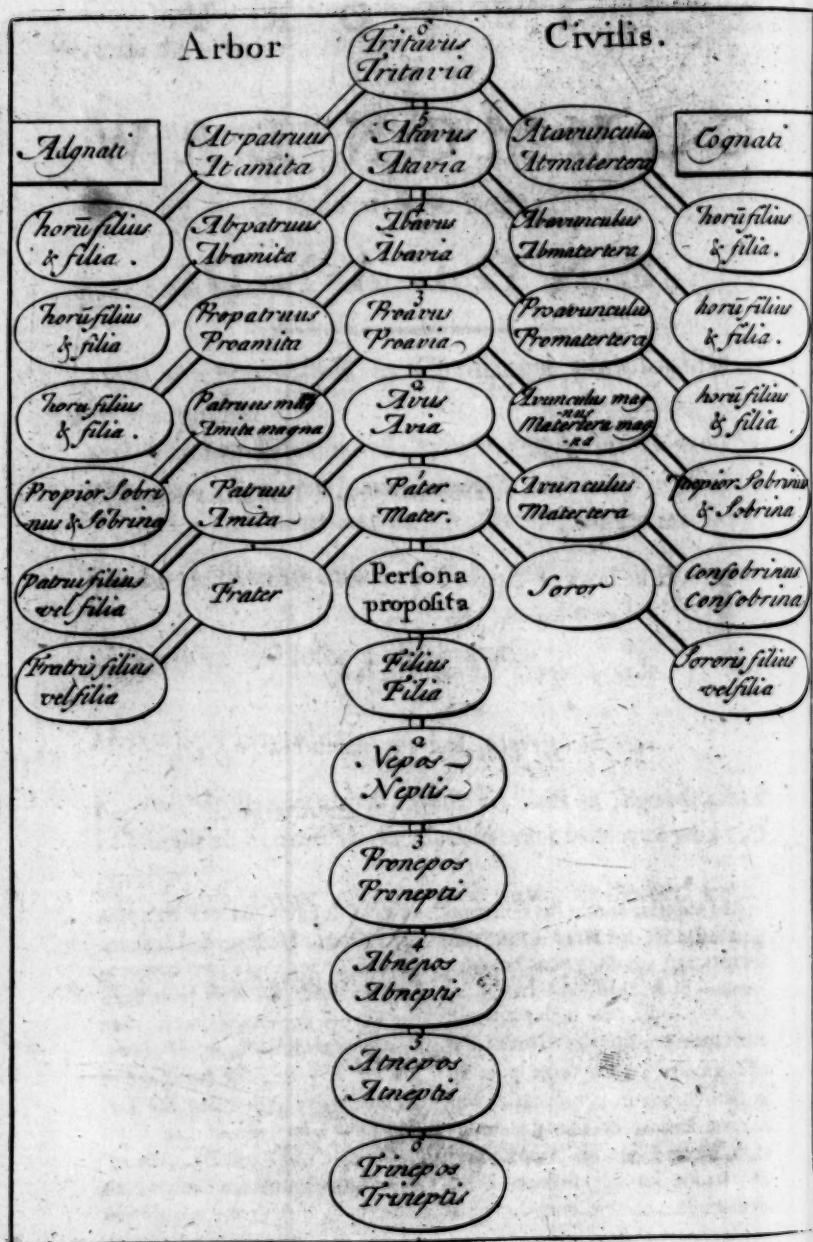
THE black book of the new law, collected by me, and digested into alphabetical titles, written with my own hand, which is the original copy.

(Signed)

*Matthew Hale.*







# THE HISTORY OF THE COMMON LAW OF ENGLAND.

## CHAPTER I.

*Concerning the distribution of the laws of ENGLAND into Common law and Statute law. And first, concerning the Statute law, or Acts of parliament.*

THE laws of England may aptly enough be divided into two kinds, viz.

*Lex scripta*, the written law;

and,

*Lex non scripta*, the unwritten law (a).

For although, as shall be shewn hereafter, all the laws of this kingdom have some monuments or memorials thereof in writing,

(a) *Constat autem jus nostrum, quo utimur, aut scripto, aut sine scripto; ut apud Græcos Τὸ νόμον ἢ τὸ ἄγραφον.* Inst. l. 1. t. 2. f. 3. Et non ineleganter in duas species jus civile distributum esse videtur; nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmoniorum, fluxisse videtur. In his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem ea, quæ pro legibus observabant, memoris mandarent: Athenienses vero ea,

quæ in legibus scripta comprehendissent, custodirent. Id. f. 10. Indeed under those two comprehensive heads, all laws have been classed by antient writers. See Aristotle's distinction of laws, 1. Rhet. c. 3. and the Antigone of Sophocles, v. 459. But see Dr. Taylor's Elements of the Civil Law, 247. seq. and Dr. Adams' Roman Antiquities, a book which not only facilitates the acquisition of classical learning, but accelerates the communication of useful knowledge.

writing, yet all of them have not their original in writing. For some of those laws have obtained their force by immemorial usage or custom; and such laws are properly called *leges non scriptæ*, or unwritten laws or customs.

THOSE laws, therefore, that I call *leges scriptæ*, or written laws, are such as are usually called statute laws, or acts of parliament, which are originally reduced into writing before they are enacted, or receive any binding power—every such law being in the first instance formally drawn up in writing, and made, as it were, a tripartite indenture between the king, the lords, and the commons. For without the concurrent consent of all those three parts of the legislature, no such law is, or can be made. But the kings of this realm, with the advice and consent of both houses of parliament, have power to make new laws, or to alter, repeal, or enforce the old. And this has been done in all succession of ages. (A).

Now, knowledge. Sir John Fortescue *consuetudines, vel statuta, quæ et* (who was chancellor to Henry the constitutionis appellatur. I.e. sixth) remarks, *quod omnia jura* *laud. leg. Angl. c. 15.* *humana aut sunt lex nature.*

(A) The high court of parliament \* consists of the king, in his royal political capacity, of the lords spiritual, who sit there by succession, in respect of their baronies; of the lords temporal, who sit there in consequence of their respective dignities, which they enjoy either by descent or creation †; who are called to this high and omnipotent court by a writ of summons §; of knights, citizens, and burghesses, who are respectively elected by the different counties, cities, and boroughs of the kingdom, by virtue of a writ need even avoid the usual business of the which

\* *Parliamentum*. Curia, apud nos suprema; magnæ trium ordinum regni concilium, vel conventus, ut cum rege de rebus arduis consultant. Colloquium quandoq; dictum, et propriè tantum Gallico (parler) venit, quod loqui significat. Vox hæc a Normannis adjecta, nec antea Anglis nota, quibus Concilium illud interdum MICHAEL CANOT, i. e. Synodus

magna; interdum, WALTERA CANOT, i. e. sapientum conventus; item, MICHAEL SINOT, et similiter nuncupatum. Sommer. TITM. 9. Co. Pref.

† In number twenty six The number of the lords temporal is unlimited; it being in the power of the king to create as many as he may think proper.

§ 4. Inst. 1. 5. 44, 45. 47.



Now, statute laws, or acts of parliament, are of two kinds. First, those statutes which were made before time

B 2

which is issued for that purpose ||. These constitute the parliament of Great Britain—"the highest and most honourable, and absolute court of justice" in the kingdom. For its laws usages and powers consult Com. Dig. 5. v. tit. Parliament. Sir Edward Coke, in treating of the high court of Parliament, says, "there is no act of parliament but must have the consent of the lords, the commons, and the royal assent of the king; and as it appeareth by records" and our books, whatsoever passeth in parliament by this threefold consent, hath the force of an act of parliament †.

If there be the consent of one or two of them, it is only an ordinance; for the difference between an act of parliament and an ordinance is, "for that the ordinance wanteth the threefold consent, and is ordained by one or two of them †." Elfyng states the distinction thus; "what begun in the commons was only termed a petition (for they had no power to ordain); and what begun in the lords was styled an ordinance. *Actus Parliamenti* was an act made by the lords and commons; and it became *Statutum* when it received the king's consent." This passage is omitted in the late edition of Elfyng (1768, 12mo.); for himself erased it from the MS. from which that edition is printed §.

If an act appears to be passed without the assent of the commons, it is void. Mo. 824. Or, without the assent of the lords, or, of the king. Pl. Com. 79. H. Parl. 32. So, if it be by the assent of the king, the lords *spiritual* ONLY, and the commons, it is but an ordinance, and no act of parliament. Or, by the king, the lords *temporal*, and commons. 4. Inst. 25. But it is not necessary, that any of the lords *spiritual* assent; if there be a MAJORITY of the lords ASSEMBLED in parliament. Seld. 3. v. 1. p. 1518. So, if all the spiritual lords assent *conditionally*; for, the condition is void. 4. Inst. 35. Or, if the spiritual lords are absent. 3. Rush. 1344. So, it is *not material*, that the assent of the king, lords, and commons, be *particularly* expressed: for PER ASSENSUM PARLIAMENTI comprehends the assent of

|| Co. Lit. 109. b. 4. Inst. 1. 6. Cot. Abr. pref. 13. b. The number of knights, citizens and burghesses, since the Union, amounts to five hundred and fifty-eight.

¶ Sir Edw. Coke. 14. R. 2. nu. 25. and 13. H. 4. nu. 25.

† 4. Inst. 25. cites 4. H. 7. 18. B. p. tous les justices. 7. H. 7. 14. 16. 11. H. 7. 27. 2. Brooke prerogative, 134. Fortescue fo. 20. cap. 18. Dier

1. Mar. 92. Vide also 2. Inst. 157.

3. Co. 20. the Prince's case. Pl. Com. 79. 2. Ha. parl. 31.

† 4. Inst. 25. cites Rot. parl. 25. E. 3. nu. 16, &c. 39. E. 3. 12. 22.

E. 3. y. 8. H. 6. cap. 29. Dier 4. Mar. 144. 39. E. 3. 7. Thorp male erravit. Rot. Parl. 37. E. 3. nu. 39.

2. R. 2. nu. 56. diversity between acts of parliament and ordinances, 2. R.

2. stat. 2. nu. 28.

§ Barr. on Stat. 41.



of memory; and, secondly, those statutes which were made within or since time of memory. Wherein observe, that, according to a juridical account and legal signification, time within memory, is the time of limitation in a writ of right; which by the statute of Westminster 1. c. 39. (b) was settled and reduced to the beginning of the reign of king Richard I. or *ex primâ coronatione regis Ricardi primi* (c); who began his reign the sixth of July 1189, and was crowned the third of September following. So that whatsoever was before that time, is before time of memory. What is since that time, is, IN A LEGAL SENSE, said to be WITHIN, or since the time of memory.

of ALL. Jon. 104. So, if by the roll it appears, that the bill was sent to the lords, by the commons, *with a proviso annexed*, and no proviso is extant upon the record, yet it will be a good statute. Hob. 110. And, if the journal of parliament vary from the record, it will not prejudice, for *that* is no record. Hob. 110, 111. So, it is *not* material in what *form* it is expressed; for it may be in the form of a charter. Co. Lit. 98. 8. Co. 18, 19. Or, by way of a GRANT, by the king in parliament. Co. Lit. 98.—And therefore, if the king grants PER CONSILIUM FIDELIUM SUBDITORUM, and it has always had the reputation of an act of parliament, it is SUFFICIENT. 8. Co. 20. a. Jon. 103. So, if the act be penned, DE CONCILIO PRÆLATORUM, COMITUM, BARONUM, ET ALIORUM DE REGNO NOSTRO STATUIMUS, &c. 8. Co. 20. So, if it be *certified* as an act of parliament by the chancellor, when *nul tiel record* is pleaded, and a *certiorari* goes to him to certify; though the royal assent be not expressed, 3. Keb. 587.

## GENERAL

(b) Made at Westminster 25th April, ann. 3. Edw. 1. An. Dom. 1275. Co. Lit. 114, 115. Barring. Obs. Stat. 67. seq.

(c) Time of memory hath been long ago ascertained by the law to commence from the reign of Richard the first, and any custom may be destroyed by evidence of its non-existence in any part of the long period from his days to the present. This rule was adopted, when by the stat. of West. 1. c. 39. the reign of Richard I. was

made the time of limitation of a writ of right. But, since by the stat. 32. Hen. 8. c. 2. this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription, or memory, should still continue to be reckoned from an era so very antiquated. Black. Com. 2 vol. 31. a. Rol. Abr. 289. pl. 16. and Hawk. Abr. of Co. Lit. 168. But see Lit. sec. 170. and Co. Lit. 113.

AND

AND therefore it is, that those statutes, or acts of parliament, that were made before the beginning of the reign of king Richard the first, and have not since been repealed, or altered, either by contrary usage, or by subsequent acts of parliament, are now accounted part of the *lex non scripta*; being, as it were, incorporated thereinto, and become a part of the common law. And in truth, such statutes are not now pleadable as acts of parliament. Because what is BEFORE time of memory, is supposed without a beginning, or, at least such a beginning as the law takes notice of. But they obtain their strength by mere immemorial usage or custom (*d*).

AND doubtless, many of those things that now obtain as common law, had their original by parliamentary acts or constitutions, made in writing, by the king, lords, and commons (*e*); though those acts are now either not extant, or, if extant, were made before time of memory. The evidence of the truth hereof will easily appear; for that in many of those old acts of parliament that were made before

GENERAL acts are always INROLLED by the clerk of the parliament, and delivered to the *Chancery*; which inrollment in *Chancery* makes the ORIGINAL record. But PRIVATE acts are *not* inrolled, unless at the special suit of the party: the original bill, with the assent of the lords and commons and royal assent indorsed and filed, and labelled with the other bills to which the great seal is annexed, which remain with the clerk of parliament, is the original record. Hob. 109.

(*d*) If found in records or histories, they ought *not* to be reputed as acts of parliament. Com. Dig. 4. v. 334. Dr. Taylor's Elements of the Civil Law, 241. seq. and Summary of the Roman Law 113, 114, 115, 116. But *note* Hale, towards the end of this chapter.

(*e*) The common law and the statute law flow originally from the same fountain, the legislature; the statute law being the will of

the legislature, remaining on record in writing; the common law, nothing else but statutes, antiently written, but which have been worn out by time. All our law began by consent of the legislature; and whether it be now law by custom, by usage, or by writing, it is the same thing. Wilf. Par. 2. 348. 351. and see the 4th chap. of this History.

time of memory and are yet extant, we may find many of those laws enacted, which now obtain merely as common law, or the general custom of the realm. Were the rest of those laws extant, probably the footsteps of the original institution of many more laws that now obtain merely as common law, or customary laws by immemorial usage, would appear to have been at first statute laws, or acts of parliament.

THOSE antient acts of parliament which are ranged under the head of *leges non scriptæ*, or customary laws, as being made before time of memory, are to be considered under two periods. First, such as were made before the coming-in of king William I. commonly called the conqueror. Or, secondly, such as intervened between his coming in and the beginning of the reign of Richard I. which is the legal limitation of time of memory.

THE former sort of these laws are mentioned by our antient historians, especially by Brompton; and are now collected into one volume by William Lambard, Esq. in his *Tractatus de præcis Anglorum Legibus*; being a collection of the laws of the kings, Ina, Alfred, Edward, Athelstane, Edmond, Edgar, Ethelred, Canutus, and of Edward the confessor. Which last body of laws, compiled by Edward the confessor, as they were more full and perfect than the rest, and better accommodated to the then state of things, so they were such whereof the English were always very zealous;—as being the great rule and standard of their rights and liberties (B). Whereof more hereafter (f).

THE

(B) As to the laws of Edward the confessor, the authenticity of these in print is controverted by Dr. Hickes\*. Mr. Lambard, who published the first edition of the Anglo-Saxon Laws, informs his reader, that those called Edward the confessor's were printed from two manuscripts, and that though one of them was very antient, yet the other was not so old†. The most commendable circumstance of Edward the confessor's government, was his attention to the administration

\* Hic. Thes. Ling. septen. dissert. epist. 95. † Lamb. Archæ. 124. 3.

(f) Chap. 3. and 5.

## COMMON LAW OF ENGLAND. 7

THE second sort are those edicts, acts of parliament, or laws, that were made after the coming-in of king William, commonly named the conqueror, and before the beginning of the reign of king Richard I. and more especially are those which follow; whereof I shall make but a brief remembrance here, because it will be necessary in the sequel of this discourse (g), it may be more than once, to resume the mention of them. And besides, Mr. Selden, in his book called *Janus Anglorum*, has given a full account of those laws. So that at present, it will be sufficient for me briefly to collect the heads or divisions of them, under the reigns of those several kings wherein they were made.

FIRST, The laws of king William I. These consisted in a great measure of the repetition of the laws of king Edward the confessor, and of the enforcing them by his own authority, and THE ASSENT OF PARLIAMENT, at the request of the English; and some new laws were added by himself,

nistratation of justice, and his compiling, for that purpose, a body of laws, which he collected from the laws of Ethelbert, Ina, and Alfred. This compilation, though now lost (for the laws that pass under Edward's name were composed afterwards), was long the object of affection to the English nation. In truth, what were in reality the laws of Edward the confessor is much disputed by antiquarians, and our ignorance of them seems one of the greatest defects in English history. The collection of laws in Wilkins which pass under the name of Edward, are plainly a posterior and an ignorant compilation. Those to be found in Ingulf are genuine; but so imperfect, and contain so few clauses favourable to the subject, that there is no great reason for contending for them so vehemently. It is probable, that the English meant the common law, as it prevailed during the reign of Edward; which we may conjecture to have been more indulgent to liberty than the Norman institutions. The most material articles of it were comprehended in Magna Charta. Lord Lyttelton, in his *Life of Henry the Second*, has bestowed some pains on this subject. Mr. Hume, though less diffuse, is more comprehensive.

\* Spelm. in verbo Balliva.

(g) Chap. 7.

B 4

with



with the like assent of parliament, relating to military tenures, and the preservation of the public peace of the kingdom: all which are mentioned by Mr. Lambard, in the tractate before mentioned, but more fully by Mr. Selden, in his collections and observations upon Eadmerus.

SECONDLY, We find little of new laws after this, till the time of king Henry I, who, besides the confirmation of the laws of the confessor, and of king William I. brought in a new volume of laws, which to this day are extant, and called the laws of king Henry I, (*b*). The entire collection of these is entered in the red book of the exchequer, and from thence are transcribed and published, by the care of sir Roger Twissden, in the latter end of Mr. Lambard's book before mentioned. What the success of those laws were in the time of king Stephen and king Henry II. we shall see hereafter (*i*): but they did not much obtain in England, and are now for the most part become wholly obsolete, and in effect quite antiquated,]

THIRDLY, The next considerable body of acts of parliament, were those made under the reign of king Henry II. commonly called the Constitutions of Clarendon. What they were, appears best in Hoveden and Matthew Paris, under the years of that king. We have little memory else of any considerable laws enacted in this king's time, except his assizes, and such laws as related to the forests; which were afterwards improved under the reign of king Richard I. But of this hereafter more at large (*k*).

AND this shall serve for a short instance of those statutes, or acts of parliament, that were made before time of memory.

(*b*) The authenticity of the laws of Henry the first is much doubted.

(*i*) Chap. 7.

(*k*) Chap. 7.

Whereof



## COMMON LAW OF ENGLAND. 9

Whereof as we have no authentical records, but only transcripts, either in our antient historians, or other books and manuscripts; so, they being things done before time of memory, obtain at this day no further than as by usage and custom they are, as it were, engrafted into the body of the common law and made a part thereof.

AND now I come to those *leges scriptæ*, or acts of parliament, which were made since or within the time of memory, viz. since the beginning of the reign of Richard I. And those I shall divide into two general heads, viz.—those we usually call the old statutes, and those we usually call the new, or later, statutes. And because I would prefix some certain time, or boundary, between them, I shall call those the old statutes, which end with the reign of king Edward II. and those I shall call the new, or later, statutes, which begin with the reign of king Edward III. and so are derived through a succession of kings and queens down to this day, by a continued and orderly series.

TOUCHING these later sort I shall say nothing; for they all keep an orderly and regular series of time, and are extant upon record, either in the parliament rolls, or in the statute rolls of king Edward III. and those kings that follow. For excepting some few years in the beginning of king Edward III. (i. e. 2, 3, 7, 8, and 9. E. 3.) all the parliament rolls that ever were since that time have been preserved, and are extant; and for the most part, the petitions upon which the acts were drawn up, or the very acts themselves.

Now therefore touching the elder acts of parliament, viz. those that were made between the first year of the reign of king Richard I. and the last year of king Edward II. we have little extant in any authentical history; and nothing in  
any

any authentical record touching acts made in the time of king Richard I. unless we take in those constitutions and assizes mentioned by Hoveden as aforesaid (l).

NEITHER is there any great evidence, what acts of parliament passed in the time of king John; though, doubtless, many there were both in his time, and in the time of king Richard I. But there is no record extant of them, and the English histories of those times give us but little account of those laws; only Matthew Paris (m) gives us an historical account of the *magna charta*, and *charta de foresta*, granted by king John at Running Mead, the fifteenth of June, in the seventeenth year of his reign.

AND it seems that the concession of these charters was in a parliamentary way. You may see the transcripts of both charters *verbatim* in Matthew Paris, and in the red book of the exchequer. There were seven pair of these charters sent to some of the great monasteries, under the seal of king John; one part whereof, sent to the abbey of Tewkesbury, I have seen, under the seal of that king. The substance thereof differs something from the *magna charta*, and *charta de foresta*, granted by king Henry III. but not very much, as may appear by comparing them (n).

(l) Vide chap. 7.

(m) The former part of the history which goes under the name of Matthew Paris to the year 1235, is supposed to have been written by Roger Wendover; but it is generally referred to as the work of Matthew Paris, who died A. D. 1159.

receiving further information of these antient charters, may see very accurate copies of them, with a learned and elegant introductory discourse, in the law tracts of Mr. justice Blackstone. See also lord Lyttelton's History of Henry II. p. 174. and the seventh chapter of this History.

(n) Those who are desirous of

BUT

BUT though these charters of king John seem to have been passed in a kind of parliament, yet it was in a time of great confusion between that king and his nobles; and therefore they obtained not a full settlement till the time of king Henry III. when the substance of them was enacted by a full and solemn parliament.

I THEREFORE come down to the times of those succeeding kings, Henry III. Edward I. and Edward II. The statutes made in the times of those kings, I call the old statutes; partly because many of them were made but in affirmation of the common law; and partly because the rest of them, that made a change in the common law, are yet so antient, that they now seem to have been, as it were, a part of the common law; especially considering the many expositions that have been made of them in the several successions of times, whereby as they became the great subject of judicial resolutions and decisions, so those expositions and decisions, together also with those old statutes themselves, are as it were incorporated into the very common law, and become a part of it.

IN the times of those three kings last mentioned, as likewise in the times of their predecessors, there were doubtless many more acts of parliament made, than are now extant of record, or otherwise; which might be a means of the change of the common law in the times of those kings from what it was before; though all the records or memorials of those acts of parliament, introducing such a change, are not at this day extant. But of those that are extant, I shall give you a brief account, not intending a large or accurate treatise touching that matter.

THE reign of Henry III. was a troublesome time, in respect of the differences between him and his barons, which  
were

were not composed till his fifty-first year, after the battle of Evesham (a). In his time there were many parliaments, but we have only one summons of parliament extant of record in his reign, viz. 49. Henry III. (p) And we have but few of those many acts of parliament that passed in his time, viz. the great charter, and *charta de foresta*, in the ninth year of his reign, which were doubtless passed in parliament. The statute (q) of Merton (r), in the twentieth year of his reign (s); the statute of Marlbridge (t), in the fifty-second year;

(a) Fought on the 4th of August 1265.

(p) It does not appear that the citizens and burghesses, who were then, properly speaking, the commons of the realm, were regularly summoned at this time. All we find is, that the cities of York and Lincoln, and other boroughs of England, were written to and required to send two of the most discreet men, &c.

(q) It seems to be only an ordinance. Barr. Obs. Stat. 41.

(r) It is called the statute of Merton, from the parliament, or rather council, sitting at the priory of Merton, in Surrey, which belonged to regular canons, according to Dugdale. Though some of the priories might have had very large and spacious houses, yet it is not probable that there could have been accommodation for what is now called a parliament; with the intervention of commons; and it should seem, from Dugdale's short account of this priory, that it was by no means largely endowed. In all the antient palaces of the kings of England, there was a large room, or hall, for the accommodation of

what was then called a parliament, which went by the name of the parliament chamber. There is such an hall, now converted into a barn, at Eltham, in Kent, which is said to have been a palace of king John, though it is now considered by eminent antiquaries as being of a later date. Barrington has little doubt but Westminster Hall was built for the same purpose. There was likewise such a room in the old palaces of the kings of Scotland; particularly at Linlithgow, and Sterling. Barr. Obs. Stat. 41.

(s) A. D. 1236.

(t) Or Marlebridge, "now called" (as Sir Edward Coke, 2. Inst. 101. says) "Marleborough, a town in Wiltshire, the greatest fame whereof is the holding of this parliament there." "Henricus vero concilium convocavit Marlebrigium, quod est pagus celebris comitatus Wilcestræ, qui in eo conventu primum leges ab se latas, et præsertim Magnæ Chartæ de concilii sententia approbandas, deinde alias condendas curavit, quæ ad statum et commodum regni maxime



year (u); and the *dictum sine edictum de Kenelworth* (w), about the same time; and some few other old acts.

IN the time of king Edward I. there are many more acts of parliament extant than in the time of king Henry III. Yet doubtless in this king's time there were many more statutes made than are now extant. Those that are now extant, are commonly bound together in the old book of *Magna Charta*. By those statutes, great alterations and amendments were made in the common-law. And by those that are now extant, we may reasonably guess, that there were considerable alterations and amendments made by those that are not extant: which possibly may be the real, though sudden, means of the great advance and alteration of the laws of England in this king's reign, over what they were in the time of his predecessors.

"conducent." See Polyd. Virgil, p. 314. 310.

This town, in our law books, is called a city, and the freemen citizens. 2. Inst. 101. 39. E. 3. fo. 15.

Though Marlebridge, where this parliament was holden, is supposed to be the same with the town at present called Marlborough, yet there is some reason to doubt it, as the terminations are very different. In Saxton's maps, it is spelt Marlingesboro. The city of Lincoln, in the old statutes, is however called Nicoll, or Nicholl, which is a greater variation from the modern name.

Barr. Obs. Stat. 58

(u) A. D. 1267.

(w) The *dictum de Kenelworth* was an edict or award between Henry the third and those who had been in arms against him; so called, because made at Kenelworth castle, in Warwickshire, anno 31. Hen. 3. A. D. 1266. It contained a composition of those who had forfeited their estates in that rebellion, which composition was five years rent of the estates forfeited. Vide post. ch. 7. See the appendix to the last 4to ed. of the Statutes, and Hale's Hist. P. C. vol. I. 50. oct. edit.



THE first summons of parliament that I remember extant of record in this king's time, is 23. Edw. I. (x); though doubtless there were many more before this, the records whereof are either lost or mislaid. For many parliaments were held by this king before that time, and many of the acts passed in those parliaments are still extant; as, the statutes of Westminster 1, in the 3. of Edw. I.; the statutes of Gloucester, 6. Edw. I.; the statutes of Westminster 2, and of Winton, 13. Edw. I.; the statutes of Westminster 3, and of *quo warrantis*, 10. Edw. I.; and divers others in other years, which I shall have occasion to mention hereafter (y).

IN the time of king Edward II. many parliaments were held, and many laws were enacted. But we have few acts of parliament of his reign extant, especially of record.

AND now, because I intend to give some short account of some general observations touching parliaments, and of acts of parliament passed in the times of those three princes, viz. Henry III. Edward I. and Edward II. because they are of greatest antiquity, and therefore the circumstances that attended them most liable to be worn out by process of time, I will here mention some particulars relating to them, to preserve their memory, and which may also be useful to be known in relation to other things.

WE are therefore to know, that there are these several kinds of records of things done in parliament, or especially relating thereto, viz.

(x) The first regular summons we meet with, directed to the sheriff, for the election of citizens and burgeses, is in the 23d of Edw. I. The commons had by this time obtained some in-

fluence. Such however was the gross inattention to their rights, that their assent was not, for some time after, held essential to the enacting of laws.

(y) Chap. 7.

1. THE summons to parliament.

2. THE rolls of parliament.

3. BUNDLES of petitions in parliament.

4. THE statutes, or acts of parliament themselves. And,

5. THE *brevia de parlamento*, which for the most part were such as issued for the wages of knights and burgessees. But with these I shall not meddle.

FIRST, As to the summons to parliament.

THESE summons to parliament are not all entered of record in the times of Henry III. and Edward I. none being extant of record in the time of Henry III. but that of 49. Hen. III. and none in the time of Edward I. till the 23. Edw. I. But after that year, they are for the most part extant of record, viz. in *verso claus' rotulorum*, in the backside of the close rolls.

SECONDLY, As to the rolls of parliament, viz. the entry of the several petitions, answers, and transactions in parliament. Those are generally and successively extant of record in the Tower, from 4. Edw. III. downward, till the end of the reign of Edward IV. excepting only those parliaments that intervened between the first and the fourth, and between the sixth and the eleventh of Edward III.

BUT of those rolls in the times of Henry III. and Edward I. and Edward II. many are lost and few extant. Also, of the time of Henry the third I have not seen any parliament roll. And all that I ever saw of the time of Edward I. was one roll of parliament in the receipt of the exchequer of 18. Edw.

18. Edw. I. and those proceedings and remembrances which are in the *Liber Placitorum Parliamenti* in the Tower; beginning, as I remember, with the twentieth year of Edward I. and ending with the parliament of Carlisle, 35. Edw. I. and not continued between those years with any constant series; but including some remembrances of some parliaments in the time of Edward I. and others in the time of Edward II.

In the time of Edward II. besides the *rotulus ordinationum* of the lords ordonors, about 7. Edw. II. we have little more than the parliament rolls of 7. & 8. Edw. II. and what others are interspersed in the parliament book of Edward I. abovementioned; and as I remember, some short remembrances of things done in parliament in the 19. Edw. III.

THIRDLY, As to the bundles of petitions in parliament. They were for the most part petitions of private persons, and are commonly indorsed with remissions to the several courts where they were properly determinable. There are many of those bundles of petitions; some in the times of Edward I. and Edward II. and more in the times of Edward III. and the kings that succeeded him.

FOURTHLY, The statutes, or acts of parliament themselves. These seem as if in the time of Edward I. they were drawn up into the form of a law in the first instance, and so assented to by both houses, and the king; as may appear by the very observation of the contexture and fabrick of the statutes of those times. But from near the beginning of the reign of Edward III. till very near the end of Henry VI. they were not in the first instance drawn up in the form of acts of parliament. But the petition and the answer were entered in the parliament rolls, and out of both,

by

by advice of the judges and others of the king's counsel, the act was drawn up conformable to the petition and answer; and the act itself for the most part entered in a roll, called the statute roll, and the tenor thereof affixed to proclamation writs, directed to the several sheriffs; to proclaim it as a law in their respective counties. (x). [C]

BUT

(x) The art of printing, which makes the public, and not a few individuals, the guardians of the laws;—which has created a proud public right, *the liberty of the press*; a right inseparable from the principles of a free govern-

ment; and essential to the security of the British Constitution, has long since superseded the antient mode of promulgation by the sheriff.—The promulgation was, as lord Holt observes, but a mere act of *grâce*. 1. Ld. Raym. 501.

[C] If we consult the parliament rolls, whereon the petitions of the commons are entered with the king's answers; we shall find, that to petitions of a public nature the king's assent is entered in these words, "*le roy le voet*." By such answer, the royal assent was compleatly given, and the bill acquired the force of a law before it passed the great seal, and was entered on the statute roll. If the distinction may be admitted, we might say that the parliament roll contained the substance and the statute roll the form of the law. Many acts however, though undoubtedly valid, were *not* entered on the statute roll; for if the bill did not demand NOVEL LEY; that is, if the provision required would stand with the laws then in force, and did not tend to alter any statute then in being; in such case the law was compleat by the royal assent on the parliament roll, without any entry on the statute roll. Such bills were usually termed ORDINANCES, being such as might at any time be amended by the parliament without any statute; for one statute could not be altered but by another: and this distinction is clearly expressed in the rolls hereunder cited, viz.

Rot. Parl. 37. E. 3. nu. 38. "As the things granted in this parliament were *new*, and not known before then, the king asked the commons, if they would have the things so granted by way of ORDINANCE, or statute? And they answered, that it was good to have them by way of ORDINANCE, and not by statute, to the end that if any thing required amendment, it might be amended at the next parliament." [N. B. Among the ordinances on this roll, is one for regulating apparel; and it is observable, that "the chancellor, by the king's command, charged the commons, at their return into the country, to *draw and publish* the ORDINANCE of apparel, to the end that every one might wear apparel agree-



BUT because sometimes difficulties and troubles arose, by this extracting of the statute out of the petition and answer, about the latter end of Henry VI. and beginning of Edward IV. they took a course to reduce them, even in the first instance, into the full and complete form of acts of parliament; which was prosecuted (or entered) commonly in this form: *Item quædam petitio exhibita fuit in hoc parlamento formam actus in se continens, &c.* And abating that stile; the method still continues much the same; namely, that the entire act is drawn up in form, and so comes to the king for his assent.

THE ancient method of passing acts of parliament being thus declared, I shall now give an account touching those acts of parliament that are at this day extant; of the times of Henry III. Edward I. and Edward II. They are of two sorts; *viz.* some of them are extant of record; others are extant in ancient books and memorials; but not of

“able thereto.” Therefore this serves to explain in what manner those acts which were *not* entered on the *statute roll*, and consequently *not* proclaimed by the sheriffs, were made known to the people.— But to proceed]—It may be collected from this record, that though the law demanded was *new*; yet as it was such as might stand with the old laws, and did *not* alter any statute then in force, it might pass indifferently by way of ordinance, or statute; whereas if it *changed* any *old law*, it *MUST* have been *BY STATUTE*; as is farther evident from the following record. “Rot. Parl. 22. E. 3. nu. 30. The “king, by the assent of the lords, made answer, that laws and process *heretofore used* could *not* be *changed*; without making *NEW “STATUTES.*” But after all, it must be confessed, that whatever the right was; yet so *irregular* was the *practice*, that a great number of printed acts, as Prynne observes, refute this distinction. In short, acts are, by the legislature, frequently called *ORDINANCES*; and ordinances are as frequently stiled acts of parliament or statutes; and sometimes the words, *act* and *ordinance*; are coupled together. Therefore perhaps the only difference, if any, between them is, that bills entered with the royal assent on the parliament roll were called *ORDINANCES*, and when entered on the statute roll were stiled *STATUTES*. In short, however they may be verbally distinguished, their operation was the same. See Lord Macclesfield’s Trial.

record.



## COMMON LAW OF ENGLAND. 19

record. And those which are extant of record, are either recorded in the proper and natural roll, viz. the statute roll; or, they are entered in some other roll, especially in the close rolls and patent rolls, or in both. Those that are extant but not of record, are such as though they have no record extant of them; but possibly the same is lost, yet they are preserved in ancient books and monuments, and in all times have had the reputation and authority of acts of parliament.

FOR an act of parliament made within time of memory loses not its being so, because not extant of record; especially if it be a general act of parliament. For of general acts of parliament, the courts of common law are to take notice without pleading of them. And such acts shall never be put to be tried by the record, upon an issue of *nul tiel record*, but it shall be tried by the court; who, if there be any difficulty or uncertainty touching it, or the right of pleading of it, are to use for their information ancient copies, transcripts, books, pleadings, and memorials, to inform themselves; but not to admit the same to be put in issue by a plea of *nul tiel record* [D].

FOR,

[D] A general or public act of parliament is an universal rule, that regards the whole community (a).

All acts which concern the king, who is the head of the commonwealth, are *general laws*, of which the judges will take notice, without pleading. 8. Co. 28. 4. Co. 13. 77. So if they concern the queen; for she is the king's wife. Or, the prince; for he is the eldest son of the king, and heir apparent to the crown. 8. Co. 28. The st. 2. R. 2. 5. *de scandalis magnatum* is a general law; for it touches the prelates, nobles, and great officers, who are of the king's council. 4. Co. 13. So the st. 35. H. 8. which concerns the capacity of the queen. 8. Co. 28. Pl. Com. 231. a. So the st. 11. Ed. 3. which makes the Prince duke of Cornwall. 8. Co. 28. So a statute which concerns the whole SPIRITUALITY; as 21. H. 8.

(a) Blac. Com. 1. V. 86.

FOR, as shall be shewn hereafter, there are very many old statutes which are admitted and obtain as such, though there be no record at this day extant thereof; nor yet any other written evidence of the same, but what is in a manner only traditional; as, namely, ancient and modern books of pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws. For the judges and courts of justice are, *ex officio*, bound to

13. 4. Co. 76. a. 1. Brownl. 208. So 13. El. 10. and 18. El. 11. 4. Co. 76. a. 120. b. 1. Brownl. 208. So a statute which concerns all officers in general; as the st. W. 1. 26. that no sheriff or other minister take reward, &c. 4. Co. 76. a. So a statute which concerns trade in general. 4. Co. 76. b. So the st. 1. Jac. 12. which relates to shoemakers, &c. is a general law. Lut. 1410. So the st. 2. Ph. & M. 11. which relates to woollen weavers, &c. for the penalties are given to the king. Skin. 429. So a statute which concerns all the lords generally, as the st. Marl. 3. 4. Co. 76. So if it concerns all persons generally, though it be but a special or particular thing; as a statute which concerns appeals, or assises, or other particular action, *elegit*, attain, &c. the st. Mert. 6. and 4. H. 7. 17. concerning wards, 4. Co. 76. the st. W. 2. [vide W. 1. c. 20] *de malefactoribus in parais*; and *charta de foresta*; the st. 22. Ed. 4. 7. and 35. H. 8. 17. of woods in forests, chases, &c. 8. Co. 138. b.

But now, when any particular law passes which the legislature mean should operate as a public act, it is, in general, enacted, that the act shall be deemed a public act, and be judicially taken notice of as such, without specially pleading the same (b).

In an action for exercising the trade of a worsted weaver in the city of Norwich, contrary to the 13th and 14th Ch. II. there was a special verdict.

Denison J. desired that it might be considered, whether the act was not a private statute, of which, as it was NOT pleaded, the judges could not take notice; and he mentioned the case of *Rex v. Wild*, 1. Keb. 686, in which it was agreed by the court, that this statute is a private statute.

It was admitted, that the objection of Mr. J. Denison, as supported by the case of *Rex v. Wild*, was conclusive, and therefore judgment was given for the defendant (c).

(b) Co. Lit. 99. a. edit. Hargrave.

(c) *Adcock v. Gill*, Mich. 26. Geo. 2.

take notice of *public* acts of parliament, and whether they are truly pleaded or not;—and therefore they are the triers of them. But it is otherwise of *private* acts of parliament, for they may be put in issue and tried by the record, upon *nul tiel record* pleaded, unless they are produced exemplified; as was done in the Prince's case, in Lord Coke's 8th Rep. (d) and therefore the averment of *nul tiel record* was refused in that case (e).

THE old statutes or acts of parliament that are of record, as is before said, are entered either upon the proper statute roll, or some other roll in chancery.

THE first statute roll which we have, is in the Tower; it begins with *Magna Charta* and ends with Edward III. and is called *Magnus Rotulus Statutor*. There are five other statute rolls in that office, of the times of Richard II, Henry IV. Henry V. Henry VI. and Edward IV.

I SHALL now give a scheme of those ancient statutes of the times of Henry III. Edward I. and Edward II, that are recorded in the first of those rolls or elsewhere, to the best of my remembrance, and according to those memorials I have long had by me, viz,

(d) 2. Co. 28.

(e) The judges ought to take notice of a GENERAL law, for they are to determine whether it be a statute or not. *Co. Lit.* 98. *b. Dy.* 93. 1. *Lev.* 296. and therefore a man can NOT plead NUL TIEL RECORD to it. 8. *Co.* 28. *a.* So it shall NOT be proved by a journal, *Hob.* 110. or alleged, that the assent of the Commons was conditional. *Mo.* 324. But a statute which concerns only a particular species, a

particular thing, or a particular person, is deemed a PRIVATE ACT, of which the judges are not bound to take any notice, unless it be SPECIALLY pleaded. 4. *Co.* 76. *a.* A statute which relates to a particular place or town, will be considered as a PRIVATE law, though it may concern ALL persons. 4. *Co.* 76. *b.* *Skin.* 350. And in a GENERAL ACT, there may be a PRIVATE clause. 10. *Co.* 57. *b.*

MAGNA Charta. Magno Rot. Stat. membr. 40. & Rot. Cartar. 28. E. 1. membr. 16.

CHARTA de Foresta. Mag. Rot. Stat. membr. 19. & Rot. Cartar. 28. E. 1. membr. 26.

STAT. de Gloucestre. Mag. Rot. Stat. membr. 47.

WESTM. 2. Rot. Mag. Stat. membr. 47.

WESTM. 3. Rot. Clauso, 18. E. 1. membr. 6. Dorso.

WINTON. Rot. Mag. Stat. membr. 41. Rot. Clauso, 8. E. 3. membr. 6. Dorso. Pars 2. Rot. Clauso, 5. R. 2. membr. 13. Rot. Paten. 25. E. 1. membr. 13.

DE Mercatoribus. Mag. Rot. Stat. membr. 47. in Dorso.

DE Religiosis. Mag. Rot. Stat. membr. 47.

ARTICULI Cleri. Mag. Rot. Stat. membr. 34. Dorso. 2. Pars. Pat. E. 2. membr. 34. 2. Pars. Pat. 2. E. 3. membr. 25.

DE hiis qui ponendi sunt in Affiis. Mag. Rot. Stat. membr. 41.

DE Finibus levatis. Mag. Rot. Stat. membr. 37.

DE Defensione Juris liberi Parliam. Lib. Parl. E. 1. fo. 32.

STAT. Eborum. Mag. Rot. Stat. membr. 32.

DE Conjunctis Incofatis. Mag. Rot. Stat. membr. 34.

DE Escaetoribus. Mag. Rot. Stat. membr. 35. Dorso, & Rot. Claus. 29. E. 1. membr. 14. Dorso.

STAT.



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STAT. de Lincolne, Mag. Rot. Stat. membr. 32.

STAT. de Priscis, Rot. Mag. Stat. membr. 33. in Schedula de libertatibus perquirendis, vel Rot. Claus. 27. E. 1. membr. 24.

STAT. de Acton Burnel, Rot. Mag. Stat. membr. 46. Dorso, & Rot. Claus. 11. E. 1. membr. 2.

JURAMENTUM Vicecomit. Rot. Mag. Stat. membr. 34. Dorso, & Rot. Claus. 5. E. 2. membr. 23.

ARTICULI Stat. Gloucestrice. Rot. Claus. 2. E. 2. Pars 2. membr. 8.

DE Pistoribus & Braciatoribus, 2. Pars, Claus. vel Pat. 2. R. 2. membr. 29.

DE asportatis Religiosor. Mag. Rot. Stat. membr. 33.

WESTM. 4. De Vicecomitibus & Viridi Cera. Rot. Mag. Stat. membr. 33. in Dorso,

CONFIRMATIONES Chartarum. Mag. Rot. Stat. membr. 28.

DE Terris Templariorum. Mag. Rot. Stat. membr. 31. in Dorso, & Claus. 17. E. 2. membr. 4.

LITERA patens super Prisis bonorum Cleri. Rot. Mag. Stat. membr. 33. in Dorso.

DE Forma mittendi Extractas ad Scaccar. Rot. Mag. Stat. membr. 30. & membr. 36. in Dorso.



STATUTUM de Scaccar. Mag. Rot. Stat.

STATUTUM de Rutland. Rot. Claus. 12. E. 1.

ORDINATIO Forestæ. Mag. Rot. Stat. membr. 30. &  
Rot. Claus. 17. E. 2. Pars 2. membr. 3.

ACCORDING to a strict enquiry made about thirty years since, these were all the old statutes of the times of Henry III. Edward I. and Edw. II. that were then to be found of record; what other statutes have been found since, I know not.

THE ordinance called Butler's, for the heir to punish waste in the life of the ancestor, though it be of record in the parliament book of Edward I. yet it never was a statute, nor ever so received; but only some constitution of the king's council, or lords in parliament, and which never obtained the strength or force of an act of parliament.

Now the statutes that ensue, though most of them are unquestionable acts of parliament, yet are NOT of record that I know of, but only their memorials preserved in ancient printed and manuscript books of statutes; yet they are at this day, for the most part, generally accepted and taken as acts of parliament, though some of them are now antiquated and of little use; — viz.

THE statutes of Merton, Marlbridge, Westm. r. Explanatio Statuti Gloucestriz, De Champertio, De Visu Frankplegii, De Pane & Cervisia, Articuli Inquisitionis super Stat. de Winton, Circumspecte Agatis, De Distinctione Scaccarii, De Conspirationibus, De Vocatis and Warrant, Statut. de Carliol, De Prærogativa Regis, De Modo faciendi Homag. De Wardis & Releivis, Dies Communi in Banco, Stat. de Bigamis,

Bigamis, Dies communes in Banco in casu confimili. Stat. Hiberniæ, De Quo Warranto, De Effoin calumpniand, Judicium Colliftrigii, De Frangentibus Prifonar'. De Malefactoribus in Pareis, De Confultationibus, De Officio Coronatoris, De Protectionibus, Sententia lata fuper Chartas, Modus levandi Fines, Statut. de Gavelet, De Militibus, De Vaflo, De Anno Biffextili, De Appellatis, De Extenta Manerii, Compositio Menfarum vel Computatio Menfarum, Stat. De Quo Warranto, Ordinatio De Inquifitionibus, Ordinatio De Foresta, De Admensura Terræ, De Dimiffione Denarior. Stat. De Quo Warranto Novum, Ne Rector profternat Arbores in Cæmeterio, Confuetudines & Affifa de Foresta, Compositio de Ponderibus, De Tallagio, De Vifu Terræ & Servitio Regis, Compositio Ulnarum & Particarum, De Terris amortizandis, Dictum De Kenelworth, &c.

FROM whence we may collect thefe two obfervations, viz.

FIRST, that although the record itfelf be not extant, yet general ftatutes made within time of memory, namely, fince 1. *Richardi primi*, do not lofe their ftrength, if any authentical memorials thereof are in books, and feconded with a general received tradition attefling and approving the fame (f).

SECONDLY, that many records, even of acts of parliament, have in long procefs of time been loft, and poffibly the things themfelves forgotten at this day; which yet, in or

(f) As there are fome ftatutes in print which are not to be found on record, fo there are feveral on record which have never yet been printed. Sir Edw. Coke has enumerated many of his kind. 8. Rep. the Prince's cafe. But the reader will meet with feveral in the appendix to the laft quarto edition of the Statutes at large, not noticed by Coke or any other perfon; fome of which afford not only gratification to the antiquary, but information to the lawyer and the hiftorian.

near the times wherein they were made, might cause many of those authoritative alterations in some things touching the proceedings and decisions in law; the original cause of which change being otherwise at this day hid and unknown to us. And indeed, histories and annals give us an account of the suffrages of many parliaments, whereof we at this time have none, or few footsteps extant in records or acts of parliament. The instance of the great parliament at Oxford, about the fortieth of Henry III. may, among many others of like nature, be a concurrent evidence of this. For though we have mention made in our histories of many constitutions made in the said parliament at Oxford, and which occasioned much trouble in the kingdom, yet we have no monuments of RECORD concerning that parliament, or what those constitutions were.

AND thus much shall serve touching those old statutes or *leges scriptæ*, or acts of parliament, made in the times of those three kings, Henry III. Edward I. and Edward II. Those that follow in the times of Edward III. and the succeeding kings, are drawn down in a continued series of time, and are extant of record in the parliament rolls, and in the statute rolls, without any remarkable omission; and therefore I shall say nothing of them.

## C H A P. II.

*Concerning the lex non scripta, i. e. the common or municipal law of this kingdom (a).*

**I**N the former chapter I have given you a short account of that part of the laws of England which is called *lex scripta*; namely, statutes or acts of parliament, which in their original formation are reduced into writing, and are so preserved in their original form, and in the same stile and words wherein they were first made. I now come to that part of our laws called *lex non scripta*, under which I include not only general customs, or the common law properly so called, but even those more *particular* laws and customs applicable to certain courts and persons, whereof more hereafter,

AND when I call those parts of our laws *leges non scriptæ*, I do not mean as if all those laws were only oral, or communicated from the former ages to the later, merely by word; for all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty: for as the civil and canon laws have their *responsa prudentum consilia & decisiones*, i. e. their canons, decrees, and decretal determinations, extant in writing; so those laws of England which are not comprized under the title of acts of parliament, are for the most part extant in records of pleas, proceedings and judgments; in books of reports, and judicial decisions; in tractates of learned men's arguments and opinions, preserved from ancient times, and still extant in writing.

(a) See the third section to the Introduction of Blackstone's Commentaries.



BUT I therefore stile those parts of the law *leges non scriptæ*, because their authoritative and original institutions are not set down in writing in that manner or with that authority that acts of parliament are; but they are grown into use, and have acquired their binding power and the force of laws BY A LONG AND IMMEMORIAL USAGE, and by the strength of custom and reception in this kingdom (b). The matters indeed, and the substance of those laws, are in writing, but the formal and obliging force and power of them grows by long custom and use, as will fully appear in the ensuing discourse,

THE municipal laws of this kingdom, which I thus call *leges non scriptæ*, are of a vast extent, and indeed include in their generality all those several laws which are allowed as the rule and direction of justice and judicial proceedings, and which are applicable to all those various subjects about which justice is conversant. I shall, for more order, and the better to guide my reader, distinguish them into two kinds, *viz.*

FIRST, The common law, as it is taken in its proper and usual acceptation.

SECONDLY, Those particular laws applicable to particular subjects, matters, or courts,

TOUCHING the former, *viz.* the common law, in its usual and proper acceptation; this is that law by which proceedings and determinations in the king's ordinary courts of justice are directed and guided. This directs the course of descents of lands, and the kinds; the natures, and the ex-

(b) The Roman law, *de jure* nam diuturni mores, consensu utentium comprobati, legem imitantur. *non scripto*, says, *sine scripto* jus venit, QUOD USUS APPROBAVIT; Inst. l. 1. t. 2. f. 9.

## COMMON LAW OF ENGLAND. 29

tents and qualifications of estates; therein also the manner, forms, ceremonies and solemnities of transferring estates from one to another; the rules of settling, acquiring, and transferring of properties; the forms, solemnities, and obligation of contracts; the rules and directions for the exposition of wills, deeds, and acts of parliament; the process, proceedings, judgments and executions of the king's ordinary courts of justice; the limits, bounds and extents of courts, and their jurisdictions; the several kinds of temporal offences and punishments at common law, and the manner of the application of the several kinds of punishments; and infinite more particulars, which extend themselves as large, as the many exigencies in the distribution of the king's ordinary justice requires.

AND besides these more common and ordinary matters to which the common law extends, it likewise includes the laws applicable to divers matters of very great moment. And though by reason of that application, the said common law assumes divers denominations, yet they are but branches and parts of it; like as the same ocean, though it many times receives a different name from the province, shire, island, or country to which it is contiguous, yet these are but parts of the same ocean.

THUS the common law includes *lex prerogativa* (c), as it is applied with certain rules to that great business of the king's prerogative. So it is called *lex forestæ*, as it is applied under its special and proper rules to the business of forests. So it is called *lex mercatoria* (d), as it is applied under its proper rules to the business of trade and commerce. And many more instances of like nature may be given. Nay, the various and particular customs of cities, towns and

(c) Blac. Com. l. 1. c. 7.

It is a maxim of law, that "cui-

(d) 8. Rep. 126. Cro. Car. 347. "libet in sua arte credendum est."

manors are thus far parts of the common law (*e*), as they are applicable to those particular places; which will appear from these observations, *viz.*

FIRST, the common law does determine what of those customs are good and reasonable; and what are unreasonable and void. Secondly, the common law gives to those customs that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is that continuance of time that is sufficient to make such a custom. Fourthly, the common law does interpose and authoritatively decide the exposition, limits and extension of such customs.

THIS common law, though the usage, practice and decisions of the king's courts of justice may expound and evidence and be of great use to illustrate and explain it; yet it cannot be authoritatively altered or changed but by act of parliament. But of this common law, and the reason of its denomination, more at large hereafter.

Now, secondly, as to those particular laws I before mentioned, which are applicable to particular matters, subjects or courts. These make up the second branch of the laws of England, which I include under the general term of *leges non scriptæ*. By those particular laws, I mean the laws ecclesiastical and the civil law, so far forth as they are admitted in certain courts, and certain matters allowed to the decision of those courts, whereof hereafter:

IT is true that those civil and ecclesiastical laws are indeed written laws; the civil law being contained in their pandects and the institutions of Justinian, &c. their im-

(*e*) Blac. Com. 1. v. 74. seq.

## COMMON LAW OF ENGLAND. 31

perial constitutions or codes answering to our *leges scriptæ*; or statutes (*f*); and the canon or ecclesiastical laws contained for the most part in the canons and constitutions of councils and popes, collected in their *Decretum Gratiani*, and the decretal epistles of popes; which make up the body of their *corpus juris canonici*; together with huge volumes of councils and expositions, decisions and tractates of learned civilians and canonists, relating to both laws. So that it may seem, at first view, very improper to rank these under the branch of *leges non scriptæ*, or unwritten laws.

BUT I have for the following reason ranged these laws among the unwritten laws of England, *viz.* because it is most plain, that neither the canon law nor the civil law have any obligation, as laws, within this kingdom, upon any account that the popes or emperors made those laws, canons, rescripts or determinations; or because Justinian compiled their *corpus juris civilis*, and by his edicts confirmed and published the same as authentical; or because this or that council or pope made those or these canons or decrees; or because Gratian, or Gregory, or Boniface, or Clement, did, as much as in them lay, authenticate this or that body of canons or constitutions (*g*). For the king of England does not recognize any foreign authority, as superior, or equal, to him in this kingdom; neither do any laws of the pope or emperor, as they are such, bind here. But all the strength that either the papal or imperial laws have obtained in this kingdom, is only because they have been received and ad-

(*f*) For a correct and concise idea of the Roman jurisprudence, and a succinct account of the code, pandects, novels and institutes of Justinian, see Gib. Hist. 3 v. oct. t. 44. and Anc. Univ. Hist. vol. xiv. 465. The vain titles of the victories of Justinian (says Gibbon) are crumbled into dust; but

the name of the legislator is inscribed on a fair and everlasting monument. See *post. Cap. VII.*

(*g*) A truth which stood in no need of proof. Hale in this instance has been thought rather to possess the warmth of a partisan, than the coolness of an historian.

mitted,



mitted, either by the consent of parliament, and so are part of the statute laws of the kingdom; or else, by immemorial usage and custom in some particular cases and courts, and no otherwise. And therefore, so far as such laws are received and allowed of here; so far they obtain and no farther; and the authority and force they have here is not founded on, or derived from themselves. For they bind no more with us than our laws bind in Rome or Italy. But their authority is founded merely on their being admitted and received by us, which alone gives them their authoritative essence, and qualifies their obligation [A.]

AND hence it is, that even in those courts where the use of those laws is indulged, according to that reception which

(A) All the strength that either the papal or the imperial laws have obtained in this, or indeed in any other State in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases and in some particular courts; then, to use the words of Mr. justice Blackstone, they form a branch of the *leges non scriptæ*, or customary law; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is declared by the express and remarkable words of the statute 25 Hen. 8. c. 21. intituled "the act concerning Peter-pence and Dispensations." "Your grace's realm, (says the statute) recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained WITHIN this realm, for the wealth of the same, or to such other as by sufferance of your grace, and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used amongst them, and have bound themselves BY LONG USE AND CUSTOM to the observance of the same, not as to the observance of laws of any foreign prince, potentate or prelate, but as to the CUSTOMED and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents and custom, and none otherwise." For an elegant enquiry into the canon and Roman law, and when the study of law, as a science, became a distinct employment, see Dr. Robertson's Hist. Emp. Cha. V. oct. 1 v. 74, 76, 78, 81, 381. and note 25, of that admirable work.

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has been allowed them, if they exceed the bounds of that reception, by extending themselves to other matters than has been allowed them; or if those courts proceed according to that law, when it is controuled by the common law of the kingdom; the common law does and may prohibit and punish them: and it will not be a sufficient answer for them to tell the king's courts, that Justinian or pope Gregory have decreed otherwise (*b*). For we are not bound by their decrees further, or otherwise, than as the kingdom here has, as it were, transposed the same into the common and municipal laws of the realm; either by admission of, or by enacting the same, which is that alone which can make them of any force in England [B.]. I need not give particular

(*b*) For which reason, it becomes highly necessary for every civilian and canonist, who would act with safety as a judge, or with reputation as an advocate, to know in what cases; and how far; the English laws have given sanction to the Roman; in what points the latter are rejected; where they are both so intermixed and blended together, as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which enquiry the university of Oxford has for more

than a century so thoroughly seen; that in her statutes (tit. vii. sect. 1.) she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "quia juris civilis studiosos decet haud imperitos esse juris municipalis, et differentias exteri patrique juris notas habere." And the statutes of the university of Cambridge (stat. Eliz. R. c. 14. Cowel Institut. in proemio) speak expressly to the same effect. Blac. Com. 1. v. 15. Seld. in Fletam. 5. Rep. Caudrey's case, passim. 2. Inst. 509.

[B] In the primitive church, the laity were present at all synods; when the Empire became Christian, no canon was made without the emperor's consent, which included that of the people; he having in himself the whole legislative power, which our kings have not. If therefore the king and clergy make a canon, it binds the clergy in *re ecclesiastica*, but does not bind laymen, who are not represented in convocation; whose consent is neither asked nor given. 1 Salk. 412. 12 Co. 72. 2 Inst. 57, 547, 653,

697.

ticular instances herein; the truth thereof is plain and evident, and we need go no further than the statutes of 24 H. 8. c. 12. 25 H. 8. c. 19, 20, 21. and the learned notes of Selden upon Fleta, and the records there cited. Nor shall I spend much time touching the use of those laws in the several courts in this kingdom; but will only briefly mention some few things concerning them.

THERE are three courts of note, wherein the civil, and in one of them the canon or ecclesiastical, law has been, with certain restrictions, allowed in this kingdom, viz. First, the courts ecclesiastical of the bishops, and their derivative officers. Secondly, the admiralty court. Thirdly, the *curia militaris*, or court of the constable and marshal, or persons commissioned to exercise that jurisdiction. I shall touch a little upon each of these.

FIRST, the ecclesiastical courts. They are of two kinds, viz. First, such as are derived immediately by the king's commission; such was formerly the court of high commission; which though, without the help of an act of parliament, it could not in matters of ecclesiastical cognizance use any temporal punishment or censure, as fine, imprisonment, &c. yet even by the common law, the kings of England, being delivered from papal usurpation, might grant a commission to hear and determine ecclesiastical causes and offences, according to the king's ecclesiastical law, as Cawdry's case, Coke's fifth Report. Secondly, such as are not derived by any immediate commission from the king. But the laws of England have annexed to certain offices, ecclesiastical jurisdiction, as incident to such offices. Thus every bishop by his election

657. 2 Rol. Abr. 226, 454. Mo. 782. Br. Ordinary, 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palmer 379. 3 Salk. 318. 2 Vent. 44. 2 Lev. 222. 2 Inst. 97. Cases temp. lord Hardwicke 57, 326, 395. 2 Stran. 1057.

and

and confirmation, even before consecration, had ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese. And divers abbots anciently, and most archdeacons at this day, by usage, have had the like jurisdiction within certain limits and precincts.

BUT although these are *judices ordinarii*, and have ecclesiastical jurisdiction annexed to their ecclesiastical offices; yet this jurisdiction ecclesiastical *in foro exteriori* is derived from the crown of England. For there is no external jurisdiction, whether ecclesiastical or civil, within this realm; but what is derived from the crown. It is true, both anciently and at this day, the process of ecclesiastical courts runs in the name, and issues under the seal, of the bishop; and that practice stands so at this day by virtue of several acts of parliament, too long here to recount. But that is no impediment of their deriving their jurisdictions from the crown. For till 27 H. 8. cap. 24. the process in counties palatine ran in the name of the counts palatine; yet no man ever doubted but that the palatine jurisdictions were derived from the crown:

TOUCHING the severance of the bishop's consistory from the sheriff's court, see the charter of king William I. and Mr. Selden's notes on Eadmerus. And see the fifth chapter of this History (i):

Now the matters of ecclesiastical jurisdiction are of two kinds, criminal and civil.

THE criminal proceedings extend to such crimes, as by the laws of this kingdom are of ecclesiastical cognizance;

(i) For the various species of Blackstone's Commentaries, from courts ecclesiastical, see a brief account in the third volume of



as heresy, fornication, adultery, and some others; wherein their proceedings are, *pro reformatione morum, & pro salute anime*. And the reason why they have cognizance of those and the like offences, and not of others, as murder, theft, burglary, &c. is not so much from the nature of the offence; for surely the one is as much a sin as the other; and therefore if their cognizance were of offences *quatenus peccata contra Deum*, it would extend to all sins whatsoever, it being against God's law; but the true reason is, because the law of the land has INDULGED unto that jurisdiction the cognizance of some crimes and not of others.

THE civil causes committed to their cognizance, wherein the proceedings are *ad instantiam partis*, ordinarily are matters of tithes; rights of institution and induction to ecclesiastical benefices; cases of matrimony and divorces; and testamentary causes, and the incidents thereunto; as insinuation or probation of testaments, controversies touching the same, and of legacies of goods and monies, &c. (k).

ALTHOUGH *de jure communi* the cognizance of wills and testaments does not belong to the ecclesiastical court, but to the temporal or civil jurisdiction; yet *de consuetudine Anglie pertinet ad judices ecclesiasticos*, as Linwood himself agrees, *Exercit. de Testamentis*, cap. 4. in *Glossa*. So that it is the custom or law of England that gives the extent and limits of their external jurisdiction *in foro contentioso*.

THE rule by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected, either by contrary acts of parliament, or the common law and custom of England. For there are divers canons made in ancient times, and decretals of the popes, that never were admitted here in England, and particularly in

(k) Blac. Com. 3. v. § 7. seq.

relation to tithes; many things being by our laws privileged from tithes, which by the canon law are chargeable, (as timber, ore, coals, &c.) without a special custom subjecting them thereunto [C].

## WHERE

[C] The canon law is a collection of ecclesiastical constitutions, decisions and maxims, taken partly from Scripture, partly from the ancient Councils, and partly from the decrees of Popes, and the reports and sayings of the primitive Fathers, whereby all matters of polity in the Roman church are regulated.

The canon law which obtained throughout the west, till the twelfth century, was the collection of canons made by Dionysius Exiguus in 520, the capitularies of Charlemagne, and the decrees of the Popes, from Siricius to Anastasius. No regard was had to any thing not comprized in these; and the French still maintain the rights of the Gallican church to consist in their not being obliged to admit any thing else, but to be at liberty to reject all innovations made in the canonical jurisprudence since that compilation, as well as papal decrees before Siricius.

Indeed, between the eighth and eleventh centuries, the canon law was mixed and confounded with the papal decrees from St. Clement to Siricius, which till then had been unknown. This gave occasion to a new reform, or body of the canon law; which is the collection still extant under the title of *Concordia Discordantium Canonum*, first made by Ivo in 1114, and perfected in 1151 by Gratian, a Benedictine monk, from texts of Scripture, Councils, and sentiments of the Fathers, in the several points of ecclesiastical polity; and containing those constitutions which have been denominated, by way of eminence, the Decrees, and forming the first part of the canon law. It is now generally known by the name of the *Decretum* of Gratian, which was formed in imitation of the Pandects of Justinian; and is a confused, immethodical compilation, full of errors and forgeries. The second part of the canon law consists of the decrees of the Popes from the time of Pope Alexander III. to Pope Gregory IX. and published, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*.

In 1298 Pope Boniface VIII. continued the papal decrees as far as his time, under the title of *Sextus Decretalium*. To these Pope John XXII. added the Clementines, or the five books of the constitution of his predecessor Clement V. first published about the year 1317. And to all these were afterwards added, twenty constitutions of the said Pope John, called the *Extravagantes*; and some other constitutions of his successors called *Extravagantes Communes*. These are usually called the Decretals.

WHERE the canon law, or the *Stylus Curia*, is silent, the civil law is taken in as a director, especially in points of exposition and determination, touching wills and legacies.

BUT things that are of temporal cognizance only, cannot by charter be delivered over to ecclesiastical jurisdiction, nor be judged according to the rules of the canon or civil law; which is *aliud examen*, and not competent to the nature of things of common law cognizance. And therefore, Mich. 8. H. 4. Rot. 72. *coram Rege*, when the chancellor of Oxford proceeded according to the rule of the civil law in a case of debt, the judgment was reversed in B. R.—Wherein the principal error assigned was, because they proceeded *per legem civilem ubi quilibet ligeus domini regis regni sui Angliæ in qui-*

All these compose the body of the canon law; which, including the comments, make three volumes in folio; the rule and measure of church government. Indeed with us, since the Reformation, the canon law has been much abridged and restrained; only so much of it obtaining, as is consistent with the common and statute laws of the realm, and the doctrine of the established church. Besides the foreign canon law we have our legatine and provincial constitutions. In the reign of Henry VIII. it was enacted, that the canon law should be reviewed, and till that review took place, such canons, constitutions, ordinances and synodals provincial, as had been made, and were not repugnant to the law of the land, or the king's prerogative, should be used and executed. The review was proposed again in the reign of Edward VI. and of Queen Elizabeth; but as it was never accomplished, the authority of the canon law in England depends upon the statute of 2<sup>d</sup> Henry VIII. c. 19. which was repealed indeed, by Queen Mary\*, but again revived by Eliz. c. 1.

The constitutions and canons made in the convocation of the province of Canterbury in 1603, though ratified by the king, and soon after adopted in the province of York, never obtained a parliamentary confirmation; and it has been therefore adjudged, that they do not bind the laity, however the clergy may regard them. Stra. 1057.

On the use of the canon law, what shall be so called, and what canons bind, see Com. D. 2 v. oct. 165.

\* 1. and 2. Ph. and M. c. 8.

*buscunque placitis & querelis infra hoc regnum factis & emergentibus de ure tractari debet per communem legem Angliæ.* And although king H. 8. 14 anno regni sui, granted to the university a liberal charter to proceed according to the use of the university, viz. by a course much conformed to the civil law, yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and 'tis thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties to the suit are privileged (1);

THE coercion or execution of the sentence in ecclesiastical courts, is only by excommunication of the person contumacious; and upon signification thereof into Chancery, a writ *de excommunicato capiendo* issues, whereby the party is imprisoned till obedience yielded to the sentence. But besides this coercion, THE SENTENCES of the ecclesiastical courts touching some matters do introduce a REAL EFFECT, without any other execution. As a divorce *à vinculo matrimonii* for the causes of consanguinity, precontract, or frigidity, do induce a legal dissolution of the marriage. So a sentence of deprivation from an ecclesiastical benefice, does by virtue of the very sentence, without any other coercion or execution, introduce a full determination of the interest of the person deprived [D].

D 4

AND

(1) Vide 13 Eliz. c. 29. and Blac. Com. 3 v. 83, 84, 85.

[D] Numerous authorities may certainly be educed, to prove that the power of the courts ecclesiastical has been recognized by common law, and that their decisions have been considered as conclusive, upon every question over which they have been accustomed to exercise original jurisdiction; yet as the case of the late duchess of Kingston threw some light upon the subject, I have taken the liberty to subjoin a report of that case.

Her



AND thus much concerning the ecclesiastical courts, and the use of the canon and civil law in them, as they are the rule and direction of proceedings therein,

## SECONDLY,

Her grace was tried before the peers in parliament, for bigamy; the indictment stating that she, "being the wife of Augustus John Hervey, feloniously did marry and take to husband Evelyn Pierrepoint, duke of Kingston, her former husband being then alive." After she had pleaded to the indictment, and before the case on the part of the prosecution was entered into, she observed, that in respect to the supposed contract of marriage with Mr. Hervey, and which was the sole ground of prosecution, she had, prior to her marriage with the duke of Kingston, instituted a suit in the consistory court of the bishop of London *causa jactitationis matrimonii*; that in that suit Mr. Hervey was the party libelled, and of course the party defendant; that though in his defence he insisted on the marriage, yet the court ecclesiastical decreed that she was free from any matrimonial contract with Mr. Hervey; that the sentence being unreversed and unimpeached, was, as she humbly conceived, conclusive; she therefore inferred that no other evidence ought to be received by their lordships in respect to that pretended marriage; for as a court of competent jurisdiction had decided the point, it would not only be illegal, but in vain, to call parole evidence to substantiate the fact.

After some altercation, the proceedings in the suit of jactitation were permitted to be read *de bene esse*. By the sentence it was in form decreed that the present defendant was "free from all matrimonial contracts or espousals; more especially with the said Augustus John Hervey," who was, by the sentence, enjoined to "perpetual silence as to the premises libellate."

This sentence being read, the counsel for her grace, after stating that she had, subsequent to the sentence and in confidence of its legality, married the late duke of Kingston, observed, that they did not know of any court in which the constitution of this kingdom had vested authority to decide on the rights of marriage, but the ecclesiastical; and they believed it would not now be contended, that the courts of common law had any such original jurisdiction. They admitted that marriage might incidentally be determined in the courts of common law, because such determinations were absolutely necessary to the due administration of justice; but they insisted, that whenever the proper *forum* had decided on the question, the courts of common law had never taken upon themselves to examine into the grounds, nor in the least to question the validity of its decision. Hence they submitted that the sentence, being unimpeached and not reversed, was conclusive so long as it remained in force, and that of necessity it must be received in evidence in all courts and in all places,

SECONDLY, the second special jurisdiction wherein the civil law is allowed, at least as a director or rule in some cases,

places, where the subject of that marriage should become a point of litigation; on the whole, therefore, they trusted that it would repel all testimony, and of consequence, make it improper to state any.

On the first day \*, it was argued by Mr. Wallace, Mr. Mansfield, Doctor Calvert and Doctor Wynne, in support of the sentence; all of whom contended, that from the legal authorities which they had adduced in support of the position which they had advanced, there was no ground to impeach the sentence; that it was final and conclusive; that the indictment was therefore indefensible; and that as no evidence could be received, it would be idle and impertinent to state any.

On Tuesday the 16th of April, the counsel for the prosecution were heard in answer to the objections,

After premising that the argument was of a singular complexion, upon a point perfectly new in experience, not analogous to any known-rule of proceeding in similar cases, nor founded on any principle which had been stated, they insisted that if the sentence was a definitive and preclusive objection to all enquiry, the prisoner ought to have pleaded it in bar of the indictment; or have relied upon it in evidence, under her plea of not guilty. To say that such a motion was wholly unprecedented, went, as they contended, a great way in conclusion against it. To say that such a rule would be inconsistent with the plea, and repugnant to the record, seemed to them obviously decisive. "After putting herself for trial upon God and your lordships, she beseeches you not to hear her tried." "By this mode every species and colour of guilt, within the compass of the indictment, is necessarily admitted; the crime must therefore be taken as proved, in its greatest extent, with every base and every hateful aggravation that it can possibly admit; the first marriage solemnly celebrated, perfectly consummated; the second, wickedly accomplished by practising a concerted fraud upon a court of justice, and that in order to obtain a collusive sentence against the first." After thus expatiating in general terms, they proceeded to controvert the principles and authorities which had been advanced in favour of the prisoner; and after establishing the positions for which themselves contended, they inferred that the motion was wholly inadmissible; that it was inconsistent with and repugnant to all order, and every mode of trial, to debate on imaginary topics of defence, before the charge was publicly and fully heard, and that it was equally so for the court to resolve abstract questions upon hypothetical grounds.

\* Monday the 15th of April 1776.

cases, is the admiral court or jurisdiction. This jurisdiction is derived also from the crown of England;—either immediately

The advocates were, Mr. attorney general Thurlow\*, Mr. solicitor general Wedderburn†, Mr. Dunning‡, and Dr. Harris.—Mr. attorney general in concluding his speech remarked, that the sentence was conclusive upon the prisoner, but merely void as against the rest of the world; “she is therefore a wife, only for the purpose of being punished as a felon. The crime has been detected. “The inconvenient consequences of guilt are the bars which God “and the order of nature have set against it: but they have not “been found sufficient. It demands the interposition of public authority, with severer checks, to restrain it. Why is she thus “hampered with the sentence which she fabricated? Because she fabricated it: because justice will not permit her to alledge her own “fraud, for her own behoof; nor hear *her* complain of a wrong, “which *she* herself has wantonly committed.

“Is a sentence pronounced between two certain persons admissible evidence against others? Is this species of sentence so? Is “either admissible against the king—in any public prosecution—in “this particular sort of prosecution? Is such evidence probable only, “or conclusive,—against the parties to it—against strangers—against “the king—and in what cases? What, if it were obtained by collusion? what, if by *HER* collusion? will it serve *HER*? may “*SHE* offer it safely? how much will it prove against *HER*? what “evidence will do to prove the collusion? There is no end of such “questions. Were it possible for your lordships to stop this prosecution here, I have no desire to wound the mind of any person “unnecessarily, if so painful a duty may be dispensed with, but I “have rather wondered to hear such hopes as these thus far encouraged, or even entertained on the part of the prisoner with “confidence enough to make it worth her while to avow, in this “stage of the business, that she had rather have every thing presumed against her, than hear any thing proved; and to disclose “to your lordships, not an anxiety to clear her injured innocence, “but a dread of the enquiry.”

The

\* Now Lord Thurlow.

† Created Lord Loughborough, and Chief Justice of the Common Pleas, on the 14th of June 1780; in which Court he presided more than twelve years, contributing to the public felicity by a wise and impartial administration of justice. His lord-

ship resigned the office of Chief Justice on the 11th February 1793, having been previously (28th January 1793) appointed to sustain the more important one of Lord High Chancellor.

‡ Afterwards created Lord Ashburton.

diately by commission from the king; or mediately; which is several ways. Either by commission from the lord high admiral,

The lords adjourned to Friday the 19th of April, when Mr. Wallace was called on to reply; which having done, the peers adjourned to the chamber of parliament, where it was ordered that the following questions should be put to the judges, *viz.*

- I. Whether a sentence of the spiritual court against a marriage, in a suit for jactitation of marriage, is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?
- II. Whether admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

The chief justice of the common pleas\*, having conferred with the rest of the judges present, delivered the following unanimous opinion upon the questions,

MY LORDS,

MY lord chief baron and the rest of my brethren have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the fact found, although evidence against the parties, and all claiming under THEM, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence conclusive,

\* Sir William de Grey; created Lord Walsingham in 1780.



admiral, whose power and constitution is by the king;—or by the charters granted to particular corporations bordering upon

conclusive, between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding directly, the legality of marriage; and of enforcing, specifically, the rights and obligations, respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction. They do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of marriage, or its immediate consequence, "general bastardy;" or in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts; as profession, deprivation, and some others. In these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; whose certificate, when returned, received and entered upon record in the temporal courts, is a perpetual and conclusive evidence against all the world, upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry VI. requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceedings. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances; as, if a second issue, triable by a jury, is formed upon the same record; or, if the effect of the same issue is put into another form; a jury is to decide, and not the ordinary to certify, the truth; and to this purpose sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had

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upon the sea, and by commission from them; or by prescription; which nevertheless, in presumption of law, is derived at first from the crown by charter not now extant.

## THE

a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality, or fact, was not absolutely, and from its nature, an object *alieni fori*.

There was a time, when the spiritual courts wished that their determinations might, in all cases, be received as authentic in the temporal courts; and in that solemn assembly of the king, the peers, the bishops, and the judges, convened for the purpose of settling the demands of the Church, by Edward the second, one of the claims was expressed in these words: "*Si aliqua causa, vel negotium, cuius cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem iudicatum, nec per appellationem fuerit suspensum; et postmodum, coram iudice seculari, super eadem re, inter easdem personas, quæstio moveatur, et probetur per testes, vel instrumenta, talis exceptio in foro seculari non admittatur.*" The answer to which demand was expressed in this manner: "*Quando eadem causa diversis rationibus coram iudicibus ecclesiasticis et secularibus ventilatur, dicunt, quod (non obstante ecclesiastico iudicio) curia regis ipsum tractat negotium, ut sibi expedire videtur.*" For which lord Coke gives this reason, 2. Inst. 622. "For the spiritual judges proceedings are for the correction of the spiritual inner man, and *pro salute animæ* to injoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done:" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of king James the first.

It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from shewing the same respect to their proceedings, as they did to those in other courts. And therefore where in civil causes they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as PROOF of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules by which they admit the acts of other courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage

THE admiral jurisdiction is of two kinds, viz. *jurisdictio voluntaria*, which is no other but the power of the lord high

marriage, have been received as conclusive evidence on a question of legitimacy, arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage; and in like manner in personal actions immediately founded upon a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage against the contract, has been admitted evidence against such contract, in an action brought upon the same promise for damages; it being a direct sentence of a competent court disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.

But in all these cases the parties to the suit, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties and had acquiesced:

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration. First, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, or to examine witnesses, or in any manner to intervene or appeal. Secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decisions from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to ecclesiastical courts, is merely of a spiritual consideration, *pro correctione morum, et pro salute animæ*. They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was always so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law; and judge of the crime, and its proofs; in doing so, they must see with their own eyes and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the acts of Henry the eighth first declared what marriages should be lawful, and what incestuous, the temporal courts, though they

high admiral, as the king's general at sea over his fleets; or, *jurisdictio contentiosa*, which is that power of jurisdiction which

they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriages came within the levitical degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction.

Whilst an antient statute subsisted (2 H. IV. 15.) by which personal punishment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's courts will examine all things ordained by statute."

When the statute of Will. III. made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of was blasphemous, so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape,—where the defence is, that "the woman is his wife;" in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and, incidentally, to determine what is heretical and what is blasphemous; and whether it was a marriage within the statute; a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences, in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape; and the court must receive such sentences as conclusive evidence in the first instance, without looking into the case; it would vest the substantial and effective decision, though not the cognizance, of the crimes, in the spiritual court; and leave to the jury and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall, at once, seal up the lips of the witnesses, the jury and the court, and put an intire stop to the proceeding.

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that, in all cases, in which sentences, favourable to

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which the judge of the admiralty has in *foro contentioso*. And what I have to say is of this later jurisdiction.

THE

the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoner be; whose life, or liberty, or property, or fame, rests on the judgments of courts which have no jurisdiction over him in the predicament in which he stands? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge; without exercising any judgment of their own?

The spiritual court alone can deprive a clergyman: felony is a good cause of deprivation: yet in lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon THAT, and make the conviction a ground of deprivation, neither side can prove or disprove any thing against the verdict; because, as that very learned judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime and the validity of the proofs; neither of which belongs to them to do."

If therefore such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct, or rule, a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case; either in law or fact; and the difficulty will not be removed by presuming, that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court COMPETENT to the inquiry then before them; from the same reason, the determinations of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against

THE jurisdiction of the admiralty court, as to the matter of it, is confined by the laws of this realm to things *done upon the HIGH SEA only*; as depredations and piracies upon the high sea;

against the marriage has not the force of a final decision, that there was none) yet a cause of jactitation is of a different nature; it is ranked as a cause of DEFAMATION only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause: and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence from going into new proofs to make out that, or any other marriage.

So that admitting the sentence in its full extent and import, it only proves, that it did not YET appear that they were married, and not that they were NOT married at all: and by the rule laid down by lord chief justice Holt, such sentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not THEN sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true. It may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to shew that the court was *mistaken*, it may be shewn that they were *mised*.

Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Sir Edward Coke says, it avoids all judicial acts, ecclesiastical or temporal.

In *civil suits*, all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not effoining, or not demanding the view, or by suffering judgment by confession or default; or

sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprizal upon the high sea. But touching contracts, or things made within the bodies extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time.

In the proceedings of the *ecclesiastical court* the same rule holds. In *Dyer* there is an instance of a second administration fraudulently obtained to defeat an execution at law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it.

In the more modern cases, the question seems to have been, whether the *parties* should be admitted to prove collusion, not seeming to doubt that strangers might.

So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, tried by a jury, and determined by the courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the courts in Westminster-hall.

We are therefore unanimously of opinion;

First, that a sentence in the spiritual court against a marriage, in a suit of jactitation of marriage, is *not* conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion (a).

The point being thus decided, the peers returned, and being seated, the lord high steward directed the attorney-general to proceed in the prosecution. This being done, and the fact being clearly proved, her grace was found guilty.

(a) See the case of *Ilderton* and *Ilderton*, 2. H. Blac.

of English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea—as charter parties, or contracts made even upon the high sea;—touching things that are not in their own nature maritime, as a bond or contract for the payment of money;—so also of damages in navigable rivers within the bodies of counties—things done upon the shore at low-water, wreck of the sea, &c.—these things belong not to the admiral's jurisdiction. And thus the common law, and the statutes of 13 Rich. 2. cap. 15. 15 Rich. 2. cap. 3. confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea (*m*).

THIS court is not bottom'd or founded upon the authority of the civil law, but hath both its power and jurisdiction, by the law and custom of the realm, in such matters as are proper for its cognizance (*n*). And this appears by their process, viz. the arrest of the persons of the defendants, as well as by attachment of their goods; and likewise by those customs and laws maritime whereby many of their proceedings are directed, and which are not in many things conformable to the rules of the civil law. Such are those ancient laws of Ole-

(*m*) The original jurisdiction of the admiralty is either by the connivance or permission of the common-law courts; the statutes are only in affirmance of the common law, and to prevent the great power which the admiralty had gotten in consequence of the laws of Oleron. Generally speaking, the court of admiralty has no jurisdiction of matters, or contracts, done or made on land; and the true reason for their jurisdiction in matters done at sea, is because no jury can come from thence; for if the matter arise in any place

from whence the *pais* can come, the common law will not suffer the subject to be drawn *ad aliud examen*. 12 Rep. 129. Roll. Abr. 531. Owen, 122. Brownl, 37. 2 Roll. Rep. 413. Vide the case of Ouston v. Hebden *passim*. 1 Will. 101. See also Hob. 12. Blac. Com. 3 v. 107. and Fortesc. de Laud. 103. ed. 1775.

(*n*) According to sir Henry Spelman, *Gloss.* 13. and Lambard, *Archeion*, 41. it was first of all erected by king Edward the third,



ron, (o) and other customs introduced by the practice of the sea and stile of the court.

Also, the civil law is allowed to be the rule of their proceedings only so far as the same is not contradicted by the statutes of this kingdom, or by those maritime laws and customs which in some points have obtained in derogation of the civil law. But by the statute 28. Hen. 8. cap. 15. all treasons, murders, felonies done on the high sea, or in any haven, river, creek, port or place, where the admirals have, or pretend to have jurisdiction, are to be determined by the king's commission, as if the offences were done at land, according to the course of the common law.

AND thus much shall serve touching the court of admiralty, and the use of the civil law therein (p).

THIRDLY, the third court wherein the civil law has its use in this kingdom, is the military court, held before the constable and marshal anciently, as the *judices ordinarii* in this case; or otherwise before the king's commissioners of that jurisdiction, as *judices delegati*.

THE matter of their jurisdiction is declared and limited by the statutes of 8 R. 2. cap. 5. and 13 R. 2. cap. 2. And not only by those statutes, but more by the very common law is their jurisdiction declared and limited as follows, viz.

FIRST, negatively. They are not to meddle with any thing determinable by the common law. And therefore, inasmuch as matter of damages, and the quantity and deter-

(o) See chapter 7. Co. Lit. 11. 107, 108, 109. Hob. 312. 4 Inst. Blac. Com. 3 v. 108. 134. Comb. 462. 13 Rep. 53.

(p) See further as to the jurisdiction of the maritime courts, 2 Lev. 25. Hardr. 183. 1 Sid. 158. 2 Show. 232. Comb. 474. Blac. Com. 3 v. 68, 69, 70, 106,

mination thereof, is of that consuſance, the court of conſtable and marſhal cannot, even in ſuch ſuits as are proper for their conſuſance, give damages againſt the party convicted before them, and at moſt can only order reparation in point of honour, as *mendacium ſibi ipſi imponere* (q). Neither can they, as to the point of reparation in honour, hold plea of any ſuch words or things wherein the party is relievable by the courts of the common law. (r)

SECONDLY, affirmatively. Their juriſdiction extends to matters of arms and matters of war, viz,

FIRST, as to matters of arms, or heraldry, the conſtable and marſhal had conſuſance thereof; viz. touching the rights of coat armour, bearings, creſts, ſupporters, pennons, &c. and alſo touching the rights of place and precedence, in caſes where either acts of parliament or the king's patent, he being the fountain of honour, have not already determined it; for in ſuch caſes they have no power to alter it. Thoſe things were anciently allowed to the conſuſance of the conſtable and marſhal, as having ſome relation to military affairs; but ſo reſtrained, that they were only to determine the right, and give reparation to the party injured in point of honour, but not to repair him in damages, (s)

BUT, ſecondly, as to matters of war, The conſtable and marſhal had a double power, viz.

1. A miniſterial power; as they were two great ordinary officers, anciently, in the king's army; the conſtable being in effect the king's general; and the marſhal was employed in

(q) 1 Roll. Abr. 128. Year-book 37 Hen. 6. 21. Seld. of Duels, c. 10. Fortesc. de Laud. 106. 2d, 1775. (r) Blac. Com. 3 v. 68. 103, 104, 105, 106. (s) Blac. Com. 3 v. 103.

marshalling the king's army, and keeping the list of the officers and soldiers therein; and his certificate was the trial of those whose attendance was requisite. Vide Littleton, § 102.

AGAIN, 2. the constable and marshal had also a judicial power, or a court wherein several matters were determinable. As first, appeals of death or murder committed beyond the sea, according to the course of the civil law. Secondly, the right of prisoners taken in war. Thirdly, the offences and miscarriages of soldiers contrary to the laws and rules of the army. For always, preparatory to an actual war, the kings of this realm, by advice of the constable and marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law. We have extant in the Black Book of the Admiralty and elsewhere several exemplars of such military laws; and especially that of the ninth of Richard 2. composed by the king, with the advice of the duke of Lancaster and others.

BUT touching the business of martial law, these things are to be observed (1), viz.

FIRST, that in truth and reality it is not a law, but something indulged, rather than allowed, as a law. The necessity of government, order, and discipline, in an army, is that only which can give those laws a countenance;—*quod enim necessitas cogit defendi*.

SECONDLY, this indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be executed or

(1) For a fuller account of our military and maritime statutes, see the 13th chapter of the first book of Mr. Justice Blackstone's Commentaries.

exercised

exercised upon others. For others who were not listed under the army, had no colour or reason to be bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.

THIRDLY, that the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. This is in substance declared by the Petition of Right, 3 Car. 1. whereby such commissions and martial law were repealed, and declared to be contrary to law. And accordingly was that famous case of Edmond earl of Kent, who being taken at Pomfret 15 Edw. 2. the king and divers lords proceeded to give sentence of death against him, as in a kind of military court by a summary proceeding ; which judgment was afterwards, in 1 Edw. 3. reversed in parliament. And the reason of that reversal serving to the purpose in hand, I shall here insert it as entered in the record, viz.

*“ Quod cum quicunq; homo ligeus domini regis pro seditioni-*  
*“ bus, &c. tempore pacis captus & in quacunque curia domini*  
*“ regis ductus fuerit de ejusmodi seditionibus & aliis felonis*  
*“ sibi impositis per legem & consuetudine regni arrestari debet*  
*“ & responsionem adduci, et inde per communem legem, ante-*  
*“ quam fuerit morti adjudicand' (triari) &c. Unde cum no-*  
*“ torium sit & manifestum quod totum tempus quo impositum*  
*“ fuit eidem comiti propter mala & facinora fecisse, ad tempus*  
*“ in quo captus fuit & in quo morti adjudicatus fuit, fuit tem-*  
*“ pus pacis maximæ, cum per totum tempus prædictum & can-*  
*“ cellaria & aliæ plac. curiæ domini regis aperte fuer, in*  
*“ quibus cuilibet lex fiebatur sicut fieri consuevit, nec idem*  
*“ dominus rex unquam tempore illo cum vexillis explicatis*  
*“ equitabat,” &c.* And accordingly the judgment was re-



verfed: for martial law, which is rather indulged than allowed, and that only in cafes of neceffity, in time of open war, is not permitted in time of peace, when the ordinary courts of juftice are open.

In this military court, court of honour, or court martial, the civil law has been ufed and allowed in fuch things as belong to their jurifdiction, as the rule or direction of their proceedings and decifions, fo far forth as the fame is not controuled by the laws of this kingdom, and thofe customs and ufages which have obtained in England, which even in matters of honour are in fome points derogatory to the civil law. But this court has been long difufed upon great reafons. [E]

AND

[E] It is fingular that fo little has been written on the martial law of England. Martial law has in general been defined, a temporary excrefcence, bred from the diftemper of the ftate, and not as any part of the permanent laws of the kingdom. It is now, however, indifputably authorized by the legiflature \*. The king is empowered to form and eftablifh articles of war, as well for his own troops as for thofe of the Eaft India Company. When we confider therefore, in time of war, when this act is calculated to operate with effect, that no lefs perhaps than a million of fubjects are amenable to its coercion; and that the power of the crown to create crimes and annex punishments (not extending to life or limb) is not unalienably confined to the fovereign himfelf, but is diffufed by delegation to his different officers on fervice, it cannot but appear ftrange that greater attention fhould not have been paid to it. It is true, that the king hath, in the articles of war, enumerated all fuch crimes as are punifhable with DEATH; and in general all fuch as are cognizable by a court martial, when acting within the reach of the civil power; and that they are alfo explicit with refpect to fuch mifdemeanors as can be tried under the fanktion of the military act: that in the courfe of military law, winding itfelf in many forms in the fame channel with that of civil and criminal jurifprudence, a court OF ENQUIRY is frequently appointed, like a grand jury, to fearch into complaints, and finally to decide whether the perfons complained of are punifhable by law. The complaint is not fo much againft the law itfelf, as againft the proceedings under it.—For inftance, by the articles of war, and the oath which is taken by each of the members

\* An “annual act,” to “punifh mutiny and defection.”

AND thus I have given a brief prospect of these courts and matters, wherein the canon and civil law has been in some measure allowed as the rule or direction of proceedings or decisions. But although in these courts and matters the laws of England, upon the reasons and account before expressed, have admitted the use and rule of the canon and civil law; yet even herein also, the common law of England has retained those *signa superioritatis*, and the preference and superintendence in relation to those courts; namely,

FIRST, as the laws and statutes of the realm have prescribed to those courts their bounds and limits, so the courts of common law have the superintendency over those courts, to keep them within the limits and bounds of their several ju-

of a general court martial, the jurisdiction of the members is confined to a single *matter* and a single *prisoner*; notwithstanding which they have looked upon the first swearing in of the court as a sufficient authority to try a variety of offences—many matters and many prisoners; when, in propriety, the court should be sworn *de novo* on the trial of every prosecution. And tho' the oath to witnesses should be administered in the presence of the whole court, and of the prisoner himself, it has nevertheless been frequently the practice to examine a valetudinary witness by *deputation*, as it is called. It is true, his Majesty annulled the proceedings of one court martial, for having appointed six of its members to take the evidence of a valetudinary witness. But still the practice is, I believe, continued. The deputation is evermore employed, although in fact its irregularity is at any time sufficient to render the proceedings nugatory. Opiniative evidence is also too frequently admitted in courts-martial; forgetting that in such cases opinion is substituted in lieu of certainty, and the truth, if not radically discarded, at least subjected to the various motives of the deponent\*. These are a few among the many improprieties which prevail in courts-martial. Their whole proceedings should undergo a thorough reformation.

A court martial may revise its sentence, if it be returned for that purpose; but it cannot be returned more than once. See *Adye* on the subject of martial law; and a treatise intitled "Thoughts on Martial Law, and on the Proceedings of General Courts Martial," printed for T. Becket in 1779. See also the case of *Grant v. Sir Charles Gould*, reported by Mr. Hen. Blackstone, 2 v. 69.

\* Lord George Sackville's Trial, 31.

risdictions,

jurisdictions, and to judge and determine whether they have exceeded those bounds, or not. And in case they do exceed their bounds, the courts at common law issue their prohibitions to restrain them, directed either to the judge or party, or both. And also, in case they exceed their jurisdiction, the officer that executes the sentence, and in some cases the judge that gives it, are punishable in the courts at common law; sometimes at the suit of the king, sometimes at the suit of the party, and sometimes at the suit of both, according to the variety and circumstances of the case (*u*);

SECONDLY, the common law and the judges of the courts of common law have the exposition of such statutes or acts of parliament as concern either the extent of the jurisdiction of those courts, whether ecclesiastical, maritime, or military, for the matters depending before them. And therefore, if those courts either refuse to allow these acts of parliament, or expound them in any other sense than is truly and properly the exposition of them, the king's great courts of the common law, who, next under the king and his parliament, have the exposition of those laws, may prohibit and controul them (*w*);

AND thus much touching those courts wherein the civil and canon laws are allowed as rules and directions under the restrictions above-mentioned. Touching which the sum of the whole is this:

FIRST, that the jurisdiction exercised in those courts is derived from the crown of England, and that the last devolution is to the king, by way of appeal.

SECONDLY, that although the canon or civil law be respectively allowed as the direction or rule of their proceedings,

(*u*) Blac. Com. 1 v. 84.

(*w*) Blac. Com. 1 v. 84.

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yet that is not as if either of those laws had any original obligation in England, either as they are the laws of emperors, popes, or general councils, but only by virtue of their admission here; which is evident, for that those canons, or imperial constitutions, which have not been received here, do not bind; and also, for that by several contrary customs and stiles used here, many of those civil and canon laws are controuled and derogated.

THIRDLY, that although those laws are admitted in some cases in those courts, yet they are but *leges sub graviore lege*. And the common law of this kingdom has ever obtained and retained the superintendency over them, and those *signa superioritatis* before-mentioned, for the honour of the king and the common law of England (x).

(x) Such laws (says Blackstone), thus admitted, restrained, altered, new modelled and amended, are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws. Com. 1 v. 84.



## C H A P. III.

*Concerning the common law of England, its use and excellence,  
and the reason of its denomination.*

**I** COME now to that other branch of our laws, the common municipal law of this kingdom, which has the superintendency of all those other particular laws used in the before-mentioned courts, and is the common rule for the administration of common justice in this great kingdom, of which it has been always tender, and there is great reason for it. For it is not only a very just and excellent law in itself, but it is singularly accommodated to the frame of the English government, and to the disposition of the English nation; and such as by a long experience and use is, as it were, incorporated into their very temperament, and in a manner become the complexion and constitution of the English commonwealth,

INASMUCH that even as in the natural body the due temperament and constitution does by degrees work out those accidental diseases which sometimes happen, and do reduce the body to its just state and constitution; so, when at any time through the errors, distempers, or iniquities of men, or times, the peace of the kingdom and right order of government have received interruption, the common law has wasted and wrought out those distempers, and reduced the kingdom to its just state and temperament; as our present and former times can easily witness.

THIS law is that which asserts, maintains, and, with all imaginable care, provides for the safety of the king's royal person, his crown and dignity; and all his just rights, revenues,

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nues, powers, prerogatives, and government; as the great foundation (under God) of the peace, happiness, honour and justice of this kingdom. And this law is also that which declares and asserts the rights, and liberties, and the properties of the subject; and is the just, known, and common rule of justice and right, between man and man, within this kingdom.

AND from hence it is, that the wisdom of the kings of England, and their great council, the honourable house of parliament, have always been jealous and vigilant for the reformation of what has been at any time found defective in it; to remove all such obstacles as might obstruct the free course of it, and to support, countenance and encourage the use of it; as the best, safest, and truest rule of justice in all matters, as well criminal as civil.

I SHOULD be too voluminous to give those several instances that occur frequently in the statutes, the parliament rolls, and parliamentary petitions, touching this matter; and shall therefore only instance in some few particulars in both kinds, viz. criminal and civil. And first, in matters civil.

IN the parliament 18 Edw. 1. in a petition in the lords house, touching land, between Hugh Lowther and Adam Edingthorp, the defendant alledges, that if the title should in this manner be proceeded in, he should lose the benefit of his warranty; and also, that the plaintiff, if he hath any right, hath his remedy at common law by assize of mortdancestor; and therefore demands judgment, *si de libero tenemento debeat hic sine brevi respondere*. The judgment of the lords in parliament thereupon is entered in these words:

“ Et quia actio de prædicto tenemento petendo & etiam  
“ suum recuperare, si quid habere debeat vel possit eidem Adæ

“ per

" per assisam mortis antecessoris competere debet, nec est iuri  
 " consonum vel hactenus in curia ista usitat' quod aliquis sine  
 " lege communi & brevi de cancellaria de libero tenemento  
 " suo respondeat, & maxime in casu ubi breve de cancellaria  
 " locum habere potest, dictum est prefato Adæ quod sibi per-  
 " quirat per breve de cancellaria si sibi viderit expe-  
 " dire."

Rot. Parl. 13 R. 2. No. 10. Adam Chaucer preferred his  
 petition to the king and lords in parliament against sir Ro-  
 bert Knolles, to be relieved touching a mortgage which he  
 supposed was satisfied, and to have restitution of his lands.  
 The defendant appeared, and upon the several allegations on  
 both sides the judgment is thus entered, viz.

" Et apres les raisons & les allegances de l'un party & de  
 " l'autre, y sembles a seigneurs du parlement que le dit peti-  
 " tion ne estoit petition du parlement, deins que le matter  
 " en ioel comprize *doit estre* discuss per le commune ley.  
 " Et pur ceo agard fuit que le dit Robert iroit eut sans jour &  
 " que le dit Adam ne prendroit rien per say fuit icy, eins que  
 " il fueroit per le commune ley si il luy sembloit ceo faire."  
 Where we may note, the words are "*doit estre*," and not  
 " poet estre discuss per le," &c.

Rot. Parl. 50 Edw. 3. No. 43. A judgment being  
 given against the bishop of Norwich for the archdeacons  
 of Norwich, in the common bench, the bishop petitioned  
 the lords in parliament, that the record might be brought into  
 that house, and be reversed for error. " Et quoy a luy estoit  
 " finalement respondu per common assent des ils les justices  
 " que si error y fust si ascun a fine force per le ley de Angle-  
 " terre tel error fuit voire en parlement immediatement per  
 " voy de error ains en bank le roy, & en nul part ailleurs,  
 " mais

“mais si le case avenoit que error fust fait en bank le roy  
 “adonque ceo ferra amendes en parlement.”

AND let any man but look over the rolls of parliament, and the bundles of petitions in parliament, of the times of Edward I. Edward II. Edward III. Henry IV. Henry V. and Henry VI. he will find hundreds of answers of petitions in parliament, concerning matters determinable at common law, endorsed with answers to this, or the like effect:—“Sues  
 “vous a le commune ley;—sequatur ad communem legem;  
 “—perquirat breve in cancellaria si sibi viderit expedire;  
 “ne est petition du parlement;—mandetur ista petitio in  
 “cancellarium, vel cancellario, vel justiciariis de banco,  
 “vel thesaurario, & baronibus de scaccario”—and the like.

AND these were not barely upon the *bene placita* of the lords, but were *de jure*, as appears by those former judgments given in the lords house in parliament. And the reason is evident. First, because if such a course of extraordinary proceedings should be had before the lords in the first instance, the party would lose the benefit of his appeal by writ of error, according as the law allows. And that is the reason why even in a writ of error, or petition of error upon a judgment in any inferior court, it cannot go *per saltum* into parliament, till it has passed the court of king's bench, for that the first appeal is thither. Secondly, because the subject would by that means lose his trial *per pares*, and consequently his attaint in case of a mistake in point of issue or damages, to both which he is intitled by law.

AND although some petitions of this nature have been determined in that manner, yet it has been (generally) when the exception has not been started, or at least not insisted upon. And one judgment in parliament, “that cases of that  
 “nature”



"nature ought to be determined according to the course of the common law," is of greater weight than many cases to the contrary wherein the question was not stirred; yea, even though it should be stirred, and the contrary affirmed upon a debate of the question; because greater weight is to be laid upon the judgment of any court when it is exclusive of its jurisdiction, than upon a judgment of the same court in affirmance of it.

Now as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwise. And in affirmance of that law were the statutes of Magna Charta cap. 29. 5 Edw. 3. cap. 9. 25 Edw. 3. cap. 4. 29 Edw. 3. cap. 3. 27 Edw. 3. cap. 17. 38 Edw. 3. cap. 9. & 40 Edw. 3. cap. 3; the effect of which is, that no man shall be put out of his lands or tenements, or be imprisoned by any suggestion, unless it be by indictment or presentment of lawful men, or by process at common law.

AND by the statute of 1 Hen. 4. cap. 14. it is enacted, that no appeals be sued in parliament at any time to come. This extends to all accusations by particular persons, and that not only of treason or felony, but of other crimes and misdemeanours. It is true, the petition upon which that act was drawn up, begins with appeals of felony and treason; but the close thereof, as also the king's answer, refers as well to misdemeanours as matters capital. And because this record will give a great light to this whole business, I will here set down the petition and the answer verbatim. Vide Rot. Parl. 1 Hen. 4. No. 144 (a).

"Item, Supplyont les commens que desore en avant nul  
"appele de traïson ne de autre felony quelconq; soit accept  
"ou receive en le parlement ains en vous autres courts de  
"dan vostre realm dementiers que en vous dits courts purra

(a) 3 Inst. 31. 132. Raft. Ent. 49, 50. 1 Mod. 148. St. at lar. 4to. ed. 1786. 1 v. 397.

"estre

" estre terminer come ad ote fait & use ancienement en temps  
 " de vous noble progeniteurs ; et que chescun person qui en  
 " temps a venir serra accuse ou impeach en vostre parlement  
 " ou en ascuns des vos dits courts per les seignors & commens  
 " di vostre realm ou per ascun person & defence ou response a  
 " son accusement ou empeachment & sur son response rea-  
 " sonable record jugement & tryal come de ancienement  
 " temps ad estre fait & use per les bones leges de vostre realm,  
 " nient obstant que les dits empeachments ou accuséments  
 " soient faits per les seigneurs ou commens de vostre relme  
 " come que de novel en temps de Ric. nadgarius roy ad estre  
 " fait & use a contrar, a tres grand mischief & tres grand  
 " maleveys exemple de vostre realm."

" LE roy voet que de cy en avant toutes les appeles de  
 " choses faits deins le relme soient tryez & terminez per les  
 " bones leys faits en temps de tres noble progeniteurs de nos-  
 " tre dit seigneur le roy, et que tous les appeles de choses  
 " faits hors du realm, soient triez & terminez devant le  
 " constable & marshal de Angleterre, & que nul appelle soit  
 " fait en parlement desore en ascun temps a venir."

THIS is the petition and answer. The statute, as drawn  
 up hereupon, is general, and runs thus : " Item, pur plu-  
 " sieurs grands inconveniences & mischiefs que plusieurs  
 " fait ont advenus per colour des plusieurs appeles faits deins  
 " le realm avant ces heurs ordain est & establu, que desore en  
 " avant tous appeles de choses faits deins le realm soient  
 " tries & terminez per les bones leys de le realm faits & uses  
 " en temps de tres noble progeniteurs de dit nostre seigneur  
 " le roy ; et que ils les appeles de choses faits hors du realm  
 " soient tries & terminez devant le constable & marshal pur  
 " les temps esteant, et ouster accordes est & assentus que nulls  
 " appeles soient desore faits ou pursues en parlement en nul  
 " temps avenir (b)."

(b) Vide stat. 1 Hen. 4. cap. 14. 431. — See also 3 Inst. 31. 132.  
 14. and see the Quarto edit. of stat. 1 Mod. 148. Raft. Ent. 49. 5.

WHERE we may observe, that though the petition expresses only treason and felony, yet the act is general against ALL appeals in parliament. And many times the purview of an act is larger than the preamble, or the petition, and so it is here: for the body of the act prohibits all appeals in parliament, and there was reason for it. For the mischief, viz. appeals in parliament, in the time of king Richard 2. as in the petition is set forth, were not only of treason and felony, but of misdemeanors also. As appears by that great proceeding, 11 Ric. 2. against divers, by the lords appellants; consequently it was necessary to have the remedy as large as the mischief. And I do not remember that after this statute, there were any appeals in parliament, either for matters capital or criminal, at the suit of any particular person or persons.

IT is true, impeachments by the house of commons, sent up to the house of lords, were frequent, as well after as before this statute; and that justly, and with good reason. For that neither the act, nor the petition, ever intended to restrain them, but only to regulate them; viz. that the parties might be admitted to their defence to them. And as neither the words of the act, nor the practice of after-times, extended to restrain such impeachments as were made by the house of commons, so neither do those impeachments and appeals agree in their nature or reason. For appeals were nothing else but accusations, either of capital or criminal misdemeanors, made in the lords house by particular persons: but an impeachment is made by the body of the house of commons, which is equivalent to an indictment *pro corpore regni*, and therefore is of another nature than an accusation or appeal. Only herein they agree, viz. impeachments in cases CAPITAL against peers of the realm have been ever tried and determined in the lords house; but impeachments against a commoner have not been usual in the house of lords,

lords, unless preparatory to a bill, or to direct an indictment in the courts below. But impeachments at the prosecution of the house of commons for MISDEMEANORS, as well against a commoner as any other, have usually received their determinations and final judgments in the house of lords; whereof there have been numerous precedents in all times, both before and since the said act. [A]

[A]. As to parliamentary impeachment, the great guardian of the purity of our constitution, the student may consult that most excellent and useful publication, "the Parliamentary History of England;" Montesq. Sp. L. xi. 6. 1 Hal. H. P. C. 150. Rot. Parl. 4 Ed. 3. n. 2. and 6. 2 Brad. Hist. 190. Seld. Judic. in Parl. c. 1. Blac. Com. 1 v. 169. 4 v. 259. 399. & 12 & 13 W. 3. c. 2.

Since the publication of the last edition of this History, an important question, relative to the nature and continuance of Parliamentary impeachments, has taken place. Warren Hastings Esq. having been impeached by the Commons for certain high crimes and misdemeanors, the Parliament, pending his trial, (which had engrossed two or three years) was dissolved: Within a short time after the meeting of the new Parliament, namely on Friday the 17th of December 1790, it was moved in the House of Commons, "That it appears that an impeachment by this House, in the name of the Commons of Great Britain, against Warren Hastings, Esq. late Governor General of Bengal, for sundry high crimes and misdemeanors, is now depending."—The Honourable Member\* who moved it, stated, that his intention was not to move any thing which implied a doubt, but a plain assertion of the privileges of the House of Commons, as handed down to them by their predecessors, through an uninterrupted succession of five hundred years, and to be as faithfully transmitted to future generations. That in all the convulsions of our Government, in all the struggles, contests, and incidental or progressive changes of the functions and powers of the House of Commons, this alone had remained immutable—that an impeachment was never to be defeated by collusion with a Minister, or by the power of the Crown. That an impeachment abated by a dissolution of Parliament, was not to be found in plain express terms, on the Journals of the House of Lords, on the Journals of the House of Commons; nor, taking the confluence of the Rhone and the Soane, in the Minutes of the Conference between the two Houses. It was as little to be found in any

\* Mr. Burke.



book of authority, or in any good report of law cases. If the House of Commons possessed any privileges which were not held for their own individual accommodation, but in trust for their constituents, (as the right of originating money bills, and of prosecuting State criminals) they could not surrender or concede them, without a breach of faith. They could no more surrender the law and privilege of Parliament when in their favour, than they could abrogate the law when it was against them.

The House of Lords, it had been said, was a Supreme Court of Justice, and therefore the sole judge of its own proceedings. Had the Commons no control over the House of Lords in their judicial capacity? He was ready to pronounce that they had. The House of Commons had no judicial, no executive function; but as the seeming paradoxes in our constitution would appear, on examination, to be founded in the deepest wisdom, from this apparent want of function in the House of Commons, from this seeming want of power, it had all power. It was the watch, the inquisitor, the purifier of every judicial and executive function; and from its apparent impotence, derived its greatest strength and beauty. If it gave up this, it gave up all, and, like salt which had lost its flavour, was good for nothing. Were the Lords to resolve, in their judicial capacity, that a writ of error abates by prorogation or dissolution of Parliament, would the House of Commons hesitate a moment to interfere, as they had interfered in the case of Skinner and the East India Company, when the Lords attempted to usurp original jurisdiction? That interference gave rise to a dispute, but the issue was as happy as the interference was proper, and instead of fomenting discord between the two Houses, had been the means of promoting their future harmony.

This motion brought on a very animated and interesting debate. All the legal characters in the House (excepting only three or four) strongly resisted the motion; but happily without success. Against the motion it was urged, that a Committee should be appointed to search for precedents on the subject; by which course alone, an assembly so very popular could decide with the precision necessary on such a momentous occasion, and consistently with that dignity which they ought always to preserve in the eyes of the Public which they represented.

Before however recourse was had to precedents, a great preliminary question presented itself: By what rule; and upon what principles, the subject was to be investigated; whether it was a question of privilege to be decided by expediency, or a question of law to be determined by rule?

The objection was, that it appeared to be judicial. The resolution seemed to presuppose doubts of the continuance, which had never been stirred, and quieted them by a resolution that the impeachment was *now pending*. This seemed not only the assumption of judicial authority,

authority, but a declaration which might pledge the House to give it more than judicial effect.

That the present state of the impeachment, be it what it might, was a pure question of law; to be decided by the House of Lords, sitting as a Court of Impeachment on the Inquisition of the Commons; as much an English Court of criminal law, as the Court of King's Bench, or the Quarter Sessions. That it was impossible to deny this, without insisting that *Magna Charta*, and the thirty statutes confirmatory of it, were all repealed; or at least that though existing for subordinate purposes, they could in the present instance be made to bend to the will of one branch of the Legislature. That the first struggles of our ancestors were to fix deeply and immovably the root of all sound and rational liberty, by bringing justice, criminal and civil, to a precise standard. That arbitrary and anomalous proceedings, by which the subject was questioned before jurisdictions not defined by law, and exposed to trials and judgments ascertained by no legal standard, were the great vice of the ancient government of England; the grievance which first called forth the spirit and wisdom of the founders of the constitution, to put an end to those worst of evils. To bring the enjoyment of life, property, and liberty, within the plain unequivocal protection of positive law, was the very object of *Magna Charta*; and was amply secured by the twenty-ninth chapter, which enacted, that no man should be taken, or imprisoned, or deprived of any property, privilege, or franchise, but by the judgment of his equals, or the law of the land. Under such an alternative, therefore, every English trial must be had; a jury of equals must decide in all cases on the life or person of an English commoner, unless where there were exceptions by immemorial custom, or positive statute; in other words, by the law of the land.

That the trial by impeachment was one of those exceptions; its only foundation must therefore be English law, consequently the course of proceeding under it could never be changed or abrogated by a resolution of the House of Commons, but must be changed alone by the entire Legislature of the kingdom. This sacred security of the English Government *Magna Charta* first established; and its thirty confirmatory statutes, with their strong, deep, and inter-twisted roots, bound fast the spreading tree of our liberties, often shaken indeed, but never loosened, by the contending tempests of ages; and the House of Commons had ever stood as a fence around it, and planted new laws for its shelter and preservation.

That the trial by impeachment, established by the most ancient usage, was unquestionably an institution necessary for the preservation even of the laws themselves, and all the securities of the Government; but was instituted by the same cautious wisdom, and tempered with that just and benevolent spirit, which so peculiarly

characterised English jurisprudence. In times when the power of the Crown and its subordinate executive magistrates would, without due check, have laid waste all the rights of the subject; when even the judges of the law were but too often the subordinate engines of oppression, it became necessary to provide a tribunal, where criminals could be questioned, whose authority or means of corruption might over-awe or seduce the ordinary courts and ministers of justice. But though spurred on by necessity, the founders of the constitution did not forget the safety of the criminal, even in providing for the superior safety of the state. When they conferred an inquisitorial jurisdiction on one branch of the Legislature, they recollected the over-ruling influence and authority of such an accuser, and therefore conferred the power of judicature upon a coequal branch of the government; which, from being superior to awe or influence, actuated by different interests, and divided by dissimilar prejudices, was likely to hold even, the balance of this necessary and superior court of justice.

By this mode of considering the subject (and it was so considered by every writer of authority), the trial by impeachment stood harmoniously consistent with the entire constitution, and with all the analogies of law. By this mode of considering it, it could alone be reconciled with *Magna Charta*; for though the party impeached was not tried indeed by his equals, because his equals were his accusers, yet he was still tried by the law of the land, (the alternative in the wording of the statute) which he could not be, if an impeachment were not a branch of the established criminal justice of England.

Besides this legal proceeding by impeachment before the Peers of the realm as a court of criminal law, it would appear, from an inspection of the ancient records of Parliament, (many of which had been collected by Lord Chief Justice Hale in a manuscript printed by Mr. Hargrave, but not published) that the Lords anciently drew Commons before them, on the accusation of individuals, contrary to *Magna Charta* and the various confirmatory statutes. Repeated complaints were made of these abuses by the Commons, and at last they were declared to be utterly void, and were formally abolished by statute (a). The Lords however, for some time, seemed to have disregarded the statute, till upon a private impeachment of Lord Clarendon by Lord Bristol, the House of Lords referred the question to the Judges, who declared such a proceeding, on the accusation of an individual, to be contrary to law; coming, as Lord Hale expressed it in the work alluded to, within the words of the 29th chapter of *Magna Charta*: *Nec super eum ibimus, nec super eum ponemus* (b). From that time an impeachment by the

(a) 1 Hen. 4. c. 14. ante, page 65.

(b) *Mistaken in orig.*

Commons was the only case in which a Commoner could be subjected, by law, to the judicature of the Peers. Assuming then an impeachment to be a legal prosecution, on the accusation of the Commons before the Lords House, could it be any longer a question, by which of the two Houses every matter which the accused had a direct interest in for his preservation, should be adjudged? Common sense and common justice equally revolted at a judgment affecting the accused, delivered by the accuser. The court appointed to judge him could alone decide it; and it should be left to its decision, without being led by authority, influence, or fear, which were all alike hostile to the impartial deliberations of justice.

If the Commons, therefore, on examination of the subject, should have reason to think that, consistently with a series of former judgments of the Lords in similar cases, a person impeached had a legal right to be dismissed from the impeachment by a dissolution of the Parliament, they ought studiously to forbear, by an exercise of their own authority, to place any person accused by themselves in a worse condition before his judges, than he might stand in without such interference; and rather repair the defect of the law by a prospective statute, than deprive an individual of the protection of it by an *ex post facto* resolution.

That the jurisdiction of deciding on the existence or state of the impeachment, as it might be affected by the dissolution of Parliament, was a question equally judicial with any other which might occur in the course of trial. The Lords might be obliged to decide it on the objection of the person accused. And it could not be conceived, that the Commons had a privilege to affect the state of the prisoner in judgment. If the Lords indeed were, *mala fide*, to give a judgment hostile to the validity of an impeachment, and contrary to established rule and custom; which, in the absence of statute, could alone determine what was law; such a proceeding would deserve the most serious consideration, as a dangerous abuse of judicial authority. Still the question of judicature would not be changed by the possibility of such a supposition, and it equally remained to be decided by precedent, what the rule of proceeding had been which established the law.

If the decision then was with the Lords, it was next to be examined by what rule it ought and might be expected to be decided by them. If the rules of decision were not to be found in the Lords' Journals, where were they to be sought for, and what rule of law for the protection of the subject could exist? And was it to be believed, that after the virtue and wisdom of ages had been exerted for the security of the subject against every species of arbitrary power and punishment; was it to be believed, that when the probability of oppression in accusations of state, had reduced their ancestors to provide so many securities against vexation in the course of trial, that they should purposely have left, without bounds or limits, an engine of power, highly necessary indeed, but like



every other power not measured by law, destructive of all the happiness and security of life? That, therefore, the Lords must govern themselves by the judgments of their own House on similar occasions, and must deal with him, if he were placed before them, as they had dealt with others in judgment. A person accused had, by the genius of the law, a right to come under the protection of technical and formal objections, even when he stood not within the reason of them, much more if the protection insisted on was consistent with the whole spirit, and all the analogies, of justice. The Court of King's Bench could not enforce Mr. Wilkes's outlawry, though valid in every substantial part, because the County Court, where he was proclaimed and exacted, was not described upon the record with the precision sanctioned by custom; though it was plain to a common reader, that it was described so as to be distinguished from any other. The first inclination of the mind opposed such a precedent. But the defeat of justice in that, or any other particular case, was never lamented beyond its measure by any wise man; because when even good judges must thus sometimes stand disappointed in the just execution of the law, from the strictness necessary to the administration of it, the example formed an inexorable barrier against the inroads of power and tyranny, in cases where policy and expediency might easily be warped on the spur of occasions, to confiscate property, or to destroy liberty and life. It was admitted, that the power of defeating an impeachment was an inconvenient and exceptionable prerogative of the Crown; but not more dangerous than many other prerogatives formerly belonging to the Kings of England, which in subsequent ages had been taken away. But how taken away? Not by resolutions of their inexpediency, acted upon till the prerogatives were abandoned without statute, but by the regular course of legislation; the Commons employing the weight of their privileges to compel consent to a new and better rule of action, and not destroying the sanctions of government, or beating down one dangerous power by the introduction of a greater. That the state of the impeachment therefore should be decided on by the Court, where the Commons by law had lodged it; and that the former judgments of that Court of competent jurisdiction and an acquiescing Legislature, constituted the law on the subject. By an acquiescing Legislature was meant, that when a series of judgments by a court of competent jurisdiction, *à fortiori* of a court in the last resort, had established any rule of decision, every subject had a right to the benefit of it in judgment, while the rule remained in existence, unreversed by the authority of Parliament; therefore, the solution of the question (let it be discussed where it might) depended wholly on the judgments of the Lords in similar instances, to be collected from their different acts, as found in the Journals of that House.

That the Representatives were perfectly independent of the people, and were themselves, during the legal continuance of their powers,

powers, the Commons of the land. Hence the Commons of one Parliament were unfettered by their predecessors, and would never give them credit for proceedings which had not received the sanction of law. It followed equally, that when the Parliament was at an end, their controul over the rights of the subject, and their support of those rights, were equally at an end. That the idea of taking up an old proceeding *in statu quo*, as it had been called, was refuted by a fair description of all their powers, and of the limits to which they were confined. If a day was given for attendance, and the day arrived in a new Parliament, the next House of Commons could not act upon it. If the Commons imprisoned for a contempt, the door of their prison was opened, when those who imprisoned were no more. If the Commons, as a part of the Legislature, had framed a bill, and their messenger was carrying it up to the Lords when the King dissolved the Parliament—no future House could proceed upon that stage of the bill, but the whole was to be taken up again. If such a bill was in the nature of a public charge against a culprit of state, as an attainer, and bills of penalty, the same rule attached upon it, and the culprit (in effect, though in a different shape) would escape, unless the whole proceeding should be taken up *de novo*, as if it had never been moved one step. In impeachments, the Commons had a very peculiar character as accusers:—They had no judgment either to acquit or condemn, any more than other parties who prosecuted. They had no judgment of direction as to the mode of proceeding, or the extent of judicial powers in the court at whose bar they appeared; but they had a judgment of disabling at any period, by their own discretion, all farther steps in that court, and could make it wait for their *fiat*, whether the justice which they had invoked should or should not be carried into effect. The House of Lords fell under the same disability, and enjoyed the same independence in its legislative character. In its judicial, it could not imprison for a day, or a minute, beyond that which closed the Parliament: and it was denied, that even in treason, where the commitment was by the House of Lords upon an impeachment, the custody which remained, or the discretion of bail upon it in the courts of law, proved an indefinite power to extend imprisonment for the ends of justice beyond the duration of a Parliament. The Habeas Corpus Act met the case of high treason, by considering the original commitment, and the original cause of it, as legal or illegal; and that remand, bail, or discharge, had no reference to any supposed controul of the Lords over their culprit, after the Parliament was at an end, by virtue of their inherent powers. It was asked, What imprisonment restrained Mr. Hastings, or kept him even in the kingdom? What penalty of bail was a guard over him, or his friends? If any lawyer would assert, that Mr. Hastings and his bail could, upon impeachment for high crimes and misdemeanors, be touched between

Parliament

Parliament and Parliament, by an order of the Lords? Indeed if they could, it would follow, that anciently imprisonment would or might have been indefinite at the mercy of the King, in all cases of impeachment for high crimes and misdemeanors. If it were said, "No, the courts may remand the culprit or not, by their discretion, as it is admitted they can upon impeachments for high treason;" to this it was answered, "Shew first the impeachment upon a charge for high crimes and misdemeanors, or even the bail existing after the Parliament, and it would be seen what the courts of law had done with it." That there was one dilemma very difficult, if not impossible, to be solved. If the Lords could not imprison at all, or bail for a time beyond the Parliament, upon impeachment for high crimes, and might yet proceed *in statu quo* at a new Parliament, the power was a mockery of justice, for they had no prisoner. If they could, on the other hand, imprison him till the next Parliament, they could have done it indefinitely, as long as it pleased the King to discontinue Parliament. Upon writs of error, the Lords could not stir in the next Parliament, by the common law, if the error was not reversed or affirmed in the former parliament; which had extended itself even to the case of prorogation in early times. Lord Hale had said, in a manuscript written with his own hand, that he was present when the Lords determined, that *in prorogation* writs of error abated (unless by special order continued), but that in 1673 it was first otherwise determined; affirming, however, that by dissolution of Parliament the writ of error completely abated (and he wrote before 1678), and that he had known it so determined. It was true, that now writs of error do not abate, and that in that respect the order of 1678 had been affirmed by usage; but if the law was originally different, it proved the idea with great force, that "*in statu quo*" was out of sight, even upon writs of error, and the analogy would, in that view of it, apply to impeachments. But the analogy between them was denied, if it was contended, that because writs of error do not abate, impeachments could be taken up *in statu quo*. In writs of error the record remains, and so in impeachments; but in writs of error there is no evidence. Was it meant by the term "depending," that the record was in court, so that Mr. Hastings might be called again to plead, or that the evidence was to go on where it left off?

Upon the topic of precedents, the first important fact was, that from the time impeachments began, down to the year 1678, not one instance was to be found of an impeachment continued by the next Parliament.—It was probable, that some of the earlier impeachments were closed within the Parliament which first adopted them, but it should be recollected how very short the continuance of each Parliament used to be in those periods.—It might, therefore,

be fairly supposed, that many of those proceedings died a sudden death, by the King's power in terminating the court.—It would as little be forgotten, that most of the intervals between one Parliament and another were extremely tedious; which was a fact that would account for the policy of the constitution, in liberating the victim from custody, if the other alternative should have been to keep him in prison for an indefinite period. But the case was far from resting there; for instances, before 1673, occur, within the reigns of Charles the First and Charles the Second, where impeachments, in fact, were at an end, if not in law, after the Parliament was dissolved before judgment. It was however admitted that such an actual end of an impeachment, thus interrupted by an end of the Parliament itself, might have arisen from the inexpediency of carrying on the old prosecution. Yet two cases had existed, in which it should seem as if the Lords and Commons had supposed the impeachment legally at an end on the dissolution of Parliament.

One of them was the case of the Duke of Buckingham in the second year of Charles the First, when that minion was a just object of popular indignation. The Commons impeached him; pending the impeachment the King dissolved that Parliament, evidently for the purpose of defeating this challenge upon the justice of the Lords. In the mean time the King extracted the articles of impeachment, made them articles of an information against the Duke in the Court of Star Chamber, and stopped that proceeding under the colour of being satisfied by the evidence that he was innocent.—This conduct was clear notice to the Commons, that the King looked upon the impeachment, after a dissolution, as a nullity. The next Parliament was convened in a very little time after the manœuvre, and we hear no more of the impeachment, nor is any complaint suggested against the insult upon the Commons, though in that light it would have been viewed if the impeachment had been depending. Was the Duke less execrated by the Commons? Had he corrupted them? Had the King enslaved them? Were they ignorant? or cold in the scent?—The Duke was more detested than ever; the King was at their mercy, and they were as great men as any that ever lived.—Nothing more need be said of them than that, in that very year, they obtained the second *Magna Charta* of England, in the Petition of Right.

In 1665 another instance occurred, of Drake impeached for a libel. The Lords directed, that in case of a dissolution he should be the object of prosecution by the Attorney-General in the King's Bench.—Why?—Could not imprisonment for the interval have satiated their spleen? And would it not have ensured the culprit when the next Parliament should meet? The order for prosecuting by the Attorney-General after a dissolution was illegal; but the suspicion which gave birth to it, appeared to have been, that he would else  
have



have escaped, and that neither imprisonment of him, nor bail, would have been legal between that Parliament and the next. Though, prior to these periods, instances were to be found of proceedings in Parliament against criminals of state (not in the form of impeachments) extended in fact from one Parliament into the next; yet as far as those obsolete precedents went, this at least appeared: 1st, That special orders were deemed necessary so to continue the charge, which necessity admitted that, without special orders, it would have abated; and, 2dly, That unless it appeared the charge was acted upon *in statu quo* after evidence heard, it would not reach the object of the resolution under debate: namely, the power to go on against Mr. Hastings just where the Managers had left off.—With respect to the celebrated case of Lord Danby in 1678, it was observed as to the character of these times, that every sound historian had called them times of popular fury and persecution: It had been said, “Yes, but the Lords and Commons were quarrelling when the Parliament began, which resolved, that impeachments were *in statu quo*. It was therefore a reluctant evidence wrung from the Lords, by the public spirit of the Commons, in favour of their constitutional rights.” The answer was, that at that critical period the Lords and Commons were united, and equally violent against the Popish plot, or against the Minister, then disgraced; that Lord Shaftesbury and the malecontents of the day had forced themselves upon the Cabinet, and governed that very Committee, whose Chairman was Lord Essex; and these being the actors and the views, the act was in character. It would speak for itself; it was full of trick—it shunned the light—and made a new law without reason, precedent, or analogy. The Lords were first reminded of the impeachments, and what course did they take? They referred to their Committee an enquiry of two points which were distinct; one, as to the law respecting the continuance or abatement of appeals and writs of error, without apparent occasion for it; another, as to the fact respecting the particular state of the impeachments which had been made in the former Parliament. The answer given on the following day was perhaps as curious a passage as any upon the records of Parliament, and vitiated the whole proceeding engrafted upon it. They reported, that from their view of a judgment by the Lords in 1673, petitions of appeal and writs of error were in force to be acted upon. They add (as appeared by Sir Thomas Raymond’s Report \*), that the papers contained in that judgment of 1673 were too voluminous. In a distinct sentence, after stating the impeachments to be upon special matter assigned, they gave their opinion on a point of law to which they had never been interrogated, and at one stroke affirmed that opinion to be, that all those impeachments were *in statu quo*; not in reference to the judgment of 1673, nor with a single ground of any kind, either stated or insinuated. Both parts

\* T. Raym. 383.

of the Report were then adopted by the House, who, it did not appear, had ever looked at the judgment in 1673, but gave their Committee ample credit for a candid statement of its effects upon writs of error. Who would have entertained a doubt, upon that Report, that in 1673 the Lords had judicially affirmed the law by which writs of error were to continue after a dissolution? But when the judgment, as it was called (which was only a resolution of the Lords on a reference to their Committee), was brought forward, it appeared that no question was put or imagined respecting dissolution of Parliament with a reference to writs of error; the only point raised being, Whether if prorogation had intervened, those writs were at an end? If it should be urged that "prorogation was the same as dissolution of Parliament in principle," that proposition would be refuted, as well as denied to be law, under the wings of Lord Hale, who died after 1673, and before 1678\*. In his Manuscript, that great man alludes to the resolution of 1673, as correcting and reversing the law of a former judgment (made by the Lords in his hearing, and in that same Parliament), that even upon prorogation writs of error abated. But was Lord Hale of opinion, that prorogation and a dissolution of Parliament were the same as to writs of error? So far from it, after seeming to adopt the decision of 1673, as good law, he proceeds to affirm, as a point clear of doubt, that after a dissolution of Parliament the writ of error and petition of appeal was at an end; adding, that he had himself known it so ruled. Here then was detected an insidious concealment of the fact by those Lords, in 1678, as to the import of the judgment in 1673, and at the best a perverted analogy between two cases, which the existing law had completely distinguished. But the opinion asserted in the next breath, by those Lords, as to impeachments, could not be justified even by that judgment, if the first analogy between prorogation and a dissolution had been correct, because there was no fair analogy between writs of error and impeachments, after a dissolution of Parliament; one of them containing mere points of law upon the face of the record, the other containing an accusation upon fact. In one of them the public accuser, who had a discretion to interpose before judgment, was dead, and in the other no plaintiff was changed, but the same parties appeared. In character with such a mode of declaring or making laws as that in 1678, was the subsequent conduct of those times. Nothing could be more infamous than what happened in the case of many persecuted Catholics, whom the Judges, and Scroggs at their head, executed, against all the rules of law and principles of justice. In character with such a law, and so made, was the course of impeachment against Lord Stafford. The trial of Lord Stafford was of extreme importance in marking what shame was felt upon the judgment in 1678, and in what manner the examination of it was eluded. Jones, Maynard, and Winnington say,

\* Namely, 15th December 1676.

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"The Lords have passed a judgment. It is too clear to be disputed." ed. We are to suppose they had good reason for it; we are to suppose they had precedents; but if they had none, it is proper to make a new precedent; that is, proper to make it, by taking away Lord Stafford's life. The Earl of Danby, in 1682, accused the Peers of blowing upon their own order, by refusing a bill which would have enacted it into a law. Then came the reversal in 1685 of that resolution; so that authority against authority, the last prevails, and it was therefore the law of the court; that impeachments abated after a dissolution of Parliament. As to the period of 1685, the first year of a short and wicked reign, it deserved all the odium which a more enlightened age had thrown upon it. The reversal was indecent in the mode of it, partial in the object, and hurried through the House. But a remarkable distinction was taken by that reversal, between writs of error and impeachments: that part of the order which related to writs of error had been since received as the law of the land; and it could be proved that the other part respecting impeachments, had been recognized by subsequent authorities in the Lords, without a hint of disapprobation by the Commons.

That it was not true that the Commons were then completely enslaved; Serjeant Maynard was a host in favour of liberty, and then a Member of Parliament. He had been a champion for the order of 1678 against Lord Stafford; but in 1685, though in the habit of protesting against many encroachments, he urged not one syllable against the order of reversal, which negated the continuance of impeachments after a dissolution of Parliament. In 1690, the times were excellent, and perhaps a better era for the liberty of the subject could not be found than in that identical year. Maynard was in the House of Commons, and Somers, then Solicitor-General, the best and greatest man that perhaps ever breathed in England, or in the world. A question was directly put by the Lords, Whether impeachments continued or abated, upon a dissolution? All the old precedents were examined, and many others which were not produced in 1673, were brought from the Tower. They were all stated; not concealed as in 1678. The Committee intimated their sense of the law to be, that impeachments were at an end, upon a view of those precedents; and on view of those precedents the question of discharging the Peers was expressly put. It was true; that politics had a share in the debate which that Report produced; and that the Lords had not raised the point themselves, but had stated another in their favour. It was, however, certain that a debate arose upon that Report. What became of the House of Commons, when they saw the Report affirming impeachments to be at an end, and when they at least knew it had been a point in the debate, and when there was at least ambiguity in the question, whether the discharge was upon that ground or the pardon? They urged nothing in favour of the order of 1678.—But what says the famous

famous Protest against the resolution of the Lords to discharge the Peers? Was that silent upon the Report? No, it condemns the introduction of it into the debate, but not the doctrine which it imported, and imputed a design beyond that of relieving the Peers who had petitioned. That design was explained by Burnet, as having been to save Lord Carmarthen, against whom his enemies had raised the question again, for the purpose of exposing him to an old impeachment, which hung over his head, unless the dissolution had made an end to it. The enemies of that Peer were busy against him in the Commons; and it was proposed, at that very time, to vote that, on account of the impeachments in a former Parliament, he should be no longer one of the King's Cabinet-Ministers. Yet his enemies, aware of their own purpose in the Lords, and aware of the measures by which it had been met there, made no complaint against the danger, at least of the order in 1678, if it could have been supposed that it was not then done away by the order of 1635.

In 1717, the Earl of Oxford was made subject, by a resolution of the Lords, to an impeachment after prorogation; and it was not possible to read the dissenting Lords in their Protest, without a necessary inference, that the point in question had been, Whether if dissolution abated, prorogation had or had not a similar effect? That question assumed the law of abatement as resulting from dissolution, and the Lords in their Protest never controverting that law, but affirming and commending it, expressed their fears that it might be weakened by a judgment in the case of prorogation, which they represented as the same thing; but the majority thought otherwise; and it was impossible to conceive that judgment either supported in argument, or in argument arraigned, unless upon this point conceded, namely, that a dissolution of Parliament was the termination of an impeachment. Upon this view of the precedents a serious doubt was expressed, at least whether impeachments could be taken up *in statu quo* by a new Parliament. That if all the precedents were thrown into the fire, a fate which, upon the mere character of the times, two of them deserved, yet the constitutional powers residing in both Houses of Parliament, and general illustration considered, the House was adjured to be deliberate and wary, in examining all the materials which could enlighten their judgment, before they affirmed, in the form of an asserted privilege, a judicial duty of the court, whose jurisdiction they could not change, and whose judgment they could not force.

Here it was enquired whether by the terms "now depending" in the motion, was meant that the impeachment was depending in all its forms, or, in other words, *in statu quo*, as it depended before the dissolution of the last Parliament? If so, the question seemed to be substantially different from the mere consideration whether the impeachment abated, and must be renovated by a particular process elsewhere, not necessary to be then described. It was answered, that



that with regard to the word "depending," introduced in the motion, it was the very word used in the resolution sent up to the House of Lords in the case of the Earl of Danby, and therefore had been thought the proper word to be used on the present occasion.

After this enquiry, the arguments against the motion were resumed. It was said to have been admitted, that there was no precedent to be found previous to 1678, of an impeachment having survived a dissolution; and therefore, not being able to establish that order on the direct custom of Parliament, recourse had been had to the different precedents which were collected by the Committee in 1673, when the question concerning writs of error was before the House. But besides that none of those precedents related to impeachments by the Commons, all of them which were criminal proceedings, and not mere writs of error, were criminal appeals, directly contrary to *Magna Charta* and the ancient statutes; persisted in, even after the statute 1st of Henry the Fourth, chapter the 14th; and finally declared by the Lords, on reference to all the Judges, to be contrary to law, in Lord Bristol's charge of Lord Clarendon. Such precedents therefore, even if applicable, could be no legal foundation for the short-lived order of 1678. That in those cases, the Lords had given a day to the parties, in the succeeding Parliament, which they had omitted in the present instance, even if they had the power to have given one; by which, according to all authorities, there was an incurable chasm in the proceedings. The party was, without day, in court, and his bail finally discharged from their recognizances, which went only to have him before that Parliament; Mr. Hastings therefore was not bound to appear, nor had the Lords any process to enforce his appearance;—at all events none to continue the proceedings, which were discontinued by no day having been given.—For this Hawkins's Pleas of the Crown, title "Discontinuance," where all the authorities are collected, was referred to.—Again, on advertent to the precedents, it was said that that of 1673 (founded too on the anomalous and illegal proceedings alluded to) declared only that writs of error continued from session to session; and nothing farther was done on the subject till 1678, when the Parliament was dissolved subsequent to the imprisonment of the Popish Lords under the pretended plot. The nation, at that time, was wrought up to a pitch of phrenzy concerning Popery, and upon *that subject*, neither the voice of reason nor law could be heard. The Lords and Commons, the accusers and judges of the Lords in the Tower, jointly examined Oates, and came to a resolution of the existence of the plot, on the sole evidence of the person who could give it no existence but by his charge on the prisoners, who were afterwards to be tried before the Peers; which fact was stated, to shew the disorder and irregularity which prevailed throughout that particular proceeding.

That

That on the 12th of March 1678, to give colour to the continuance of the impeachments, which by no resolution before that time had been voted to have continuance, it was moved to declare, that writs of error (which by the resolution in 1673 had been declared to continue from session to session) continued from Parliament to Parliament; and a Committee was appointed to search precedents. This was evidently done to give colour to what followed; for only two days after, viz. on the 17th of the same March, without doing any thing on the first order, it was added (as an instruction to the Committee) to enquire also into the state of the impeachments brought up in the last Parliament; and in two days afterwards, report was made to the House, that "*on perusal of the Journal of the 19th of March 1673*" (which, as had been shewn, applied only to the continuance of writs of error from session to session), and without search of any other authority, or statement of any one principle,—that the state of the impeachments brought up in the former Parliament was not altered. The Lords agreeing with that report, made the order of 1678.

That order therefore was established upon no antecedent custom of Parliament, but stood on a most strained and forced analogy to writs of error, which it was notorious never did continue from Parliament to Parliament till the existence of the order in question, as appeared from the authority of Lord Hale and Lord Coke, and a decision of all the Judges *temp.* Charles I.

To shew that that order was made on the spur of the occasion, the immediate and barbarous use which was made of it, on the trial and execution of Viscount Stafford, was alluded to. Lord Nottingham, whose authority had been cited for the continuance of impeachments, was Speaker of the Lords on that trial, and kindly consented that Lord Stafford should have counsel, provided they did not stand near enough to prompt him; and that aged and infirm prisoner was refused the right of arguing the question, whether his impeachment had not abated. Perhaps, however, the Managers of that day were right, when they objected to the admissibility of such argument, the existence of the order of 1678; but for that very reason, if a good one, the argument now turned the other way, since the reversal of that order of 1678 by that of 1683. The reversing order was then stated, the language of which, it was contended, should be attended to. It was not a resolution either in the abstract, or in a particular instance, that impeachments abated by the dissolution of Parliament; leaving the order of 1678 still standing as an existing resolution, which might have left future times to cite one judgment against the other, as they happened to be most consonant to the opinions of those who adopted the one or the other in argument. No, the order of 1683 entirely cut down and annihilated the former; the words of it being,—

"Resolved, that the order of the 19th of March 1678-9 shall be reversed and annulled as to impeachments."

That if the Lords had jurisdiction to make the order of 1678, they had surely jurisdiction to unmake it; as the first stood on no antecedent custom or rule of practice; and therefore while the order of 1685 remained in existence, the matter was not debateable, and the Lords (let the Commons vote what they might) could not, without an act of violence and caprice, refuse the benefit of it to any man standing before them in judgment. The question, therefore, was, Whether the order of 1685 was in force? As to that, it had stood on the Lords Journals from the time it passed, and no impeachment had continued from Parliament to Parliament. Persons impeached had been discharged from imprisonment on the footing of its existence, and under its direct authority; and the Commons, neither when it was passed, nor subsequently acted upon, had ever made the smallest objection of any invasion of their privileges, or of the law.

Having discussed the precedents of 1678 and 1685, it was said that the true way of settling their authorities, was to examine what was done by the Lords themselves, and how they regarded them the first subsequent time that the point occurred; and, also to observe how the Commons behaved on the same occasion.

The next precedent was of the Lords Salisbury and Peterborough, who were impeached of high treason in 1689. Parliament was dissolved in the beginning of 1689, and a new one met in the same year. In 1690 those Lords petitioned to be discharged from their imprisonment, stating the dissolution of Parliament, and also a free and general pardon. The operation of the pardon was referred to the Judges; on their answer, the question being put for their discharge from imprisonment, it passed in the negative; and being then admitted to bail, they remained subject to the impeachment, till they were discharged wholly upon the search of precedents, and on the order of 1685. This would be evident to whoever would look at the Journals, though it was not easy to shew it to two hundred persons, who had not the precedents, and who refused to look at them. That after the answer of the Judges, the matter of pardon was never discussed again; but the Lords assembled on the general question of the continuance of impeachments; a Committee having before been appointed to search precedents on the subject. It appeared by the Lords Journals of the 30th of March 1690, that the Committee on that day reported, "that they had examined the Journals of the House, from their beginning in the 11th of Henry VII. and all the precedents of impeachments since that time, which were in a list in the hands of the clerk, and also all the precedents brought by Mr. Pety from the Tower, among all which none were found to continue from one Parliament to another, except  
"the

"the Lords who were lately so long in the Tower;"—alluding to the Popish Lords, who were kept there under the order of 1678, and afterwards discharged under the order of 1685, which annulled it. It was upon this report, and not on the footing of pardon, that those Lords were discharged. The entry mocked all argument; it was only necessary to read it. The words were,

"After consideration of which report, and reading the orders made the 19th of March 1678, and the 22d of May 1685, concerning impeachments, and long debate thereon, it was resolved, that Lords Salisbury and Peterborough should be discharged from their bail;" and they were discharged accordingly.

What farther shewed that the pardon was no ingredient in the discharge, if the state of the proceeding were not in itself conclusive, was, that the pardon could not have destroyed the impeachment, even supposing the parties to be intitled to it; but must have been pleaded before the Lords in bar to it; and on which the Commons, according to every rule of law, as well as the most inveterate custom and privilege in impeachments, must have been heard.

Nothing remained therefore to be said on that case but the conduct of the Commons. Their impeachment was put an end to; the prisoner discharged without consent, message, or communication; and by a direct affirmance of the order of 1685, made on the face of the Lords Journals: yet no resolution was come to in the Commons, nor any objection taken by any body, though this happened when the Commons were in high strength, and in the very day-spring of the Revolution.

As an additional proof that the Lords acted on the order of 1685, it would appear, that a Committee to search precedents had been at the same time appointed, on the motion of other persons impeached, who were also discharged soon after, and on the precedent of Lords Salisbury and Peterborough. Such was the case of Sir Adam Blair, Mole, Gray, and Elliott, who had been impeached about the same time with the two Lords. A Committee was appointed to search precedents, on their application to the House of Lords; and after continuing on bail till the discharge of Lords Salisbury and Peterborough, they were also liberated, without communication with the Commons, and without any subsequent objection or dissatisfaction; though all those proceedings were of the most public notoriety, and could not be unknown to the House of Commons of that day.

The Duke of Leeds's case in 1701, which followed next in order, (and which would no doubt be relied on in favour of the continuance) it was said, made quite the other way. After the articles had been brought up, and towards the close of the same Parliament, the Lords had, by message, reminded the Commons of



their impeachment, and told them the session was drawing to its close. Soon after the Parliament was dissolved. On the meeting of the new one, the Lords, without any new message to the Commons, dismissed the articles; entering on their Journals only, that in the *former Parliament* the Duke of Leeds had been impeached, articles brought up, and answer put in; but that, the Commons not prosecuting, he was discharged. That that failure of prosecution must have applied to the expired Parliament; for if the impeachment had continued to the new one, a new message should have been sent before the articles were dismissed for want of prosecution, according to a privilege always insisted on by the Commons, that the Lords, on an impeachment, can take no step but in their presence. The discharge was therefore, because the jurisdiction of the Lords was at an end, and not an act of judicature on a subsisting impeachment, as the Commons never made any complaint, as they did when Lord Somers was acquitted in their absence.

That the cases of the Lords Somers, Oxford, and Halifax, where the entries were similar to that of the Duke of Leeds, were open to the same observation. As to the last and only remaining precedent, namely, that of the Earl of Oxford, in 1717, that precedent, it was said, established, beyond all question, what effect a dissolution was then supposed to have on an impeachment; for if it had then been doubted, much more if it had been denied, that a dissolution would destroy an impeachment, it was extravagant to believe that Lord Oxford could have been advised to build a petition to be discharged on the intervention of a prorogation only, even if a dissolution had been taken to be ineffectual; still more improbable that the Lords would have seriously entertained it, and searched for precedents on the subject. It was true, it was decided that the intervening *prorogation* had not terminated that impeachment; but the language of the Lords who protested against the decision, demonstrated that there was but one opinion concerning the effect of a dissolution. For if the Lords who voted against the effect of the prorogation, had founded their opinion on the denial also of the effect of a dissolution, the protesting Lords must have seen that the vote had been given on the reversal of the order of 1685; whereas they say, that as they, in opposition to the other part of the House, could see no difference between a prorogation and dissolution, they were afraid that the vote would *tend to weaken* the order of 1685; a language perfectly absurd, if they had conceived that the vote had been grounded on a reversal of it. The language of the Protest was therefore plainly this, "We are all agreed about the effect of a dissolution, which is the settled practice; but this vote against the effect of a prorogation, which we cannot distinguish from a dissolution, may bring even that point into doubt, which was not meant to be questioned."

Reference

Reference was now made to the case in *Carthew* \*, where Lord Holt was supposed to have decided that impeachments were not abated by dissolution. That case, it was urged, was an application by Lord Salisbury to the King's Bench to be bailed before the Parliament met; and he was properly told by the King's Bench, that being impeached of treason, he was not within the act of Habeas Corpus, and therefore not being *de jure* bailable, the rest was, of course, matter of discretion. The Court, indeed, took notice that *commitments* of the Lords continued notwithstanding a dissolution of the Parliament. But the case which would probably be relied on for that doctrine, was Lord Stafford's, which was while the order in 1678 remained in force, which beat down all subordinate or collateral opinions; and besides that, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of Parliament, in the very instance of Lord Salisbury; and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Lord Salisbury's application to Lord Chief Justice Holt. That Holt's opinion, on a collateral point too, and where the King's Bench had no jurisdiction, could never be opposed to the judgment of the House of Lords, which had jurisdiction, and which decided the very point in the very instance for which his opinion might be cited. The argument, therefore, might be rested on the principles set out with; the judgments of the Court competent to decide, and an acquiescing Legislature; nay, what was stronger than both, acquiescing accusers: for, besides that it had been admitted that no impeachments before 1678 appeared to have been continued from Parliament to Parliament, the case of the Duke of Buckingham, in the time of Charles the First, shewed the sense of the Commons themselves on that subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they had sent a remonstrance to the King on the subject; but the Parliament was nevertheless dissolved. The new one met equally revengeful against Buckingham; yet instead of going on with the impeachment, they addressed the King to remove him from his councils, on the imputation of the crimes charged by the former articles; but the impeachment was never mentioned again, not even in debate. It was worth observing, too, that Sir Edward Coke sat in that Parliament, who had been removed from his seat in the King's Bench by Buckingham, and who had also made him Sheriff, to prevent his return to Parliament; yet it never occurred to that great lawyer, with all his resentments about him, to consider the prosecution as existing.—Hence it was contended, that the precedents all went

\* *Carth.* 132.

to the utter extinction even of the articles in the Lords House by the dissolution of Parliament, without the right of proceeding even *de novo* on the trial, for that in every one of the precedents the articles had been only carried up, and no proceedings had been had in the original Parliament, which had received them. Even the solitary order of 1678 had not declared that an impeachment in part proceeded upon, remained in *statu quo*, to be taken up again without a re-commencement of trial; so far from it, it appeared to be worded to repel such a conclusion. For though, in the very same order, the Lords had declared, in the abstract, that writs of error, on which no trial could exist at all, to be broken and divided, continued from Parliament to Parliament; yet, in the next line, when they came to impeachments, they studiously changed the stile, and instead of declaring generally that impeachments also continued from Parliament to Parliament, they only resolved that the dissolution did not alter the state of those impeachments brought up in the preceding Parliament; a declaration which, as no trial had begun on them, could not be brought to bear upon the present impeachment. Leaving therefore the question of the total abatement to rest, for the present, upon the authority of the precedents only, though they might be fortified by solid principles of law, a much greater question lay behind, which the resolution, though its meaning was avowed, did not distinctly express; viz. Whether, supposing the articles themselves did still remain of record untouched by the dissolution, *the proceedings upon them* existed in *statu quo*? a position not only without support from any one precedent, but repugnant to every principle of English justice.

That in order to decide upon both the questions, *i. e.* either upon the existence of the impeachment at all after a dissolution, or its existence in *statu quo* if it still remained, the principles of English criminal law, and the rules of criminal trial in other cases, should be considered; because the constitution, in permitting the existence of a Court of Impeachment as a Supreme Criminal Court for high and extraordinary occasions, could never have intended that it should bring all the other laws into disrepute by an avowed departure from their principles;—or deprive the subjects of England of the great protection of English justice, applicable to every other occasion. The nature of the trial by impeachment, deprived the accused of many advantages which the law had provided for the safety of accused persons in all other cases; therefore the reasonings from other proceedings would not closely apply; but in the absence of precedents, the universal securities and sanctions of justice ought not to be farther violated, than necessarily and unavoidably flowed from the very frame and constitution of the Court. And in considering whether the impeachment at all continued, or, if continuing, could go on in an uninterrupted course, the House ought to keep in view the general principles of English criminal

iminal law and justice, and to apply them as far as precedent and sound analogy would support the application. That it was proper to bring in review before the House, the anxious solicitude of the constitution, which was but another name for the law, to protect persons accused from all vexation and oppression; provisions which constituted the great characteristic of English liberty, established for ages, and which other nations were now struggling, through blood and confusion, to obtain. An impeachment continuing, as was proposed and insisted on, violated them all.

The first security was, that persons accused should be brought to a speedy, or rather an immediate trial, to avoid long imprisonment, and the anxious miseries of a doubtful condition. This was amply provided for by the Habeas Corpus Act; which enabled a person arrested to call upon his accuser to bring forward his indictment the first session after his imprisonment, and to try him on it at the next; on failure of which, he was, in the first instance, entitled to bail, and in the last, to a final discharge from the accusation.

That if some limitation had not applied to an impeachment, by its being a proceeding confined to a Parliament, it appeared strange that the provisions of that second *Magna Charta* had not been extended to that case, or at least some convenient limitation enacted, consistent with that species of proceeding; for if impeachments might continue beyond one Parliament, they might continue for life, and operate to perpetual imprisonment. The liberty of the subject would then no longer depend on the law, but on the will of one branch of the Legislature.

The next great security was, that the persons appointed to try, were to be purged from all prejudice by the challenges of the prisoner. It was true, that the constitution of the Court, where the Judges sat by inheritance or creation of the Crown, to a certain degree ousted that great privilege; and in one Parliament, or in the course of trials in general, its operation in so large a body could not be very dangerous. But if it could continue from Parliament to Parliament, without limitation, the party impeached might come at last to be judged by strangers to his impeachment, and, what was worse, even by his very accusers; who, coming up from the other House by succession and creation, would judge upon property and life, on their own accusation; yet without the possibility of challenge or objection from the accused. The law of England could never mean to subject any of its subjects to such a horrible inquisition. If at the time of the Union, the Legislature had thought that an impeachment could have had such continuance, it seemed reasonable to suppose that a clause of disqualification would have been introduced, to prevent the Peers of Scotland from sitting as judges on trials, the first parts of which they by no possibility could have heard.



The last great rule of English trial was, that the trial, once begun, should go on without alteration or separation, to prevent impressions from any source but the evidence; that the evidence should be given by the witnesses in presence of the prosecutor, the prisoner, and the Court; and that the verdict should be given on the recent view and recollection of it. Here again, the frame and constitution of the Court of Impeachment, to a certain extent, deprived the subject of those valuable privileges. But still, considering it as a trial in *one Parliament*, the evil, though to be lamented, had its limits. The prosecutors were the same; the Court nearly so; and the evidence might, during adjournment, or even prorogation, be, with the aid of notes, recollected. But what was the case when the Parliament was dissolved? It could not be said that the pendency of an impeachment deprived the people of the free choice of their representatives; not one Member, therefore, of the former Parliament might return, by election, to the new one. How, then, was such new House of Commons to proceed?

Suppose the former Parliament to have been dissolved just when the accused had made his defence, and that while the evidence on which his accusation rested was fresh in his own memory, and present to the recollection of the Managers and the Lords, he had rested his whole defence on observations on that evidence, without calling witnesses; appealing to the honour of the Managers for the truth of them, as well as to the justice of the House—suppose, when he had thus finished, and had impressed even the Commons themselves with his innocence, the Parliament had been dissolved; how could such a trial proceed *in statu quo*? Were the new Commons to reply to the prisoner, whose defence they had never heard? or was the prisoner to make it over again, when the foundation of it was forgotten, in order that the new Commons might hear it? And supposing he could do it, it would still be observations on evidence which the Managers had never seen, and of which there was no record, and which, even if recorded, would be written evidence, contrary to the genius of English law. Suppose even an interval of years to exist, which might often happen, between the giving of the evidence by the witnesses in one Parliament, and the hour of deliberation and judgment in the next; and in a case, too, where a judgment of guilt or innocence might absolutely depend upon the most accurate recollection of the proofs; in what situation would the Lords and Commons stand upon such an occasion? The Lords who had sat from the beginning of the trial, must judge wholly from the injudicial notes of a sleepy clerk, and with but a feeble recollection of the oral testimony; and the new Lords, open to no challenge, could judge from no other possible source, never having even seen the witnesses who delivered it. In the same blind manner must the Commons demand judgment against a person whom the old Commons, who had heard the evidence, might have acquitted.

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By such rules of trial, who would destroy the life of a sparrow, or even pluck a feather out of his wing? What would the Judges, as well as the Lords, say to the case of a Peer indicted for murder in the King's Bench, and whose indictment was brought up by *certiorari* for trial, as it must be, into the Lords' House, if, pending such a trial, and when the most important witness was under cross-examination, the Parliament were dissolved;—would the witness be set up again a twelvemonth afterwards, to go on with what he had been saying the year before? or would the trial begin *de novo*? That that part of the argument might rest on the answer which the Lords and Judges would give to that judicial question, where the Commons could have no pretence of privilege; and if it were answered, that the trial should begin *de novo*, upon what principles should a Commoner be exposed to dangers on an impeachment, which could not belong to a Peer, on an indictment for the highest crime?

Argument being now almost exhausted *against the motion*, it was, in general, added, that in the lapse of seven centuries, no criminal trial in any Court had ever been interrupted, and taken up again *in statu quo*; nor had any one impeachment ever been so continued from one Parliament to another; nor before that moment had such a position been ever hinted at by any historian, or asserted by any man living, in or out of Parliament. The case of the Duke of Suffolk was an extraordinary one to look to as a precedent. The noble Duke had been banished, and his enemies, not thinking *that* a sufficient punishment, moved an impeachment in that House; but it was not true that a trial had been begun in one Parliament and continued in the next. While those proceedings, however, were going on at home, the noble Duke lay dead in France. One inherent principle in the constitution was, that the Crown commanded the activity and exertion of its different powers. In support of that position, the general administration of justice, and the hardship attending the discontinuance or revival of suits in ordinary Courts of Judicature, were referred to; adding, that there were always days appointed for putting in appearances. That the same rule of law obtained in the Parliament; by the King's proclamation a session was to be holden upon a particular day; and upon the authority of Lord Coke every session is a new Parliament; and new bills are usually brought in. That there was a great difference between writs of error and appeals and an impeachment; writs of error and appeals being regulated by the laws and customs of the realm, modified by the usage of Parliament; but an impeachment was always governed by the law of Parliament only. That upon a dissolution, impeachments must abate, since a person impeached was put without a day, which consequently entitled him to his discharge. That the House had no power to revive an impeachment, since it was an acknowledged principle, inherent in

in the constitution, that the Parliament should die, and all its proceedings determine with its existence,

It was again asked, Whether the word *depending* meant depending in *statu quo*? for if the question meant that it was depending in *statu quo*, no one could hesitate to declare that it outraged every idea of judicial proceeding. So far from its being a proposition, the maintenance of which was essential to the privileges of the Commons of England, it was a doctrine which militated against their privileges. That they gave up their privileges in giving up the point of abatement, since one of the most essential privileges of the people was security and protection against indefinite trial, the protracted and tedious trial to which the doctrine of non-abatement led. That it was not only abated as to the *statu quo*, but abated with respect to the record in the House of Lords. It could not surely be imagined that the last House of Commons could bind the present by any one of its resolutions—if it had the right so to do, it must also have the means—it could not; nor could a blade of grass, the property of any gentleman of landed property, nor the smallest coin, the property of any monied man, be touched by any resolution of that House; then how could a resolution of the House hold a subject of this country bound to answer from year to year? It may be said, Shall a Minister advise the King to dissolve the Parliament, that he might free himself from an impeachment? To this it might be answered, that perhaps the King might be properly advised to dissolve the Parliament, for the purpose of seeing whether the impeachment they had brought was countenanced by the people. Precedents, when militating against truth and justice, were to be received with jealousy. But they were always to be considered most attentively, because if they had, by their uniformity, constituted a rule of law, it was wise and prudent that they should not rashly be departed from. Did they desire too much in requesting time to search for the true rule of law, in the concurring precedents on the case? That the precedents were uniform and concurring to the support of the arguments, except in the solitary instance of 1678. If however the precedents were absurd, yet if they had made a rule of law, and that rule was established and understood, it was of more consequence that the rule of law should be acted upon, than that that impeachment should be continued upon any abstract principle of theoretic benefit. They should solemnly alter the rule by an act of the Legislature, and not abet a side-wind proceeding, against the rule so established. That the continuance of the impeachment was farther illegal, because it was not before the Law Judges, nor prosecuted by the same accuser as at the outset. The integrity of the cause was violated, it being an invariable rule in criminal jurisprudence, that the Judges and the accusers should be the same throughout. It was then asked, Whether in the case of Earl Ferrers, if a dissolution had taken place it might not have been pleaded in bar to judgment? And in the  
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and it was averred that the Crown ought to have the right of dissolving, for the purpose of abating impeachments, to see the sense of the people. And if the second House of Commons should think fit to revive the charges, they should see the whole case, or otherwise they could not conscientiously make up their minds upon the subject. It was denied that the Lords having appointed minutes to be taken, furnished thereby good evidence for the new House, inasmuch as the demeanour of witnesses went a considerable way in determining what degree of credit was to be given to their evidence; and in the end it was said, that in civil causes the rigour of evidence was nonsense, in comparison of what it was in criminal procedure,

*In support of the motion*, it was confidently said, that after having examined, with all possible accuracy and attention, such precedents as were analogous to the case in question, each of them went decidedly in favour of the impeachment remaining *in statu quo*. The growth and developement of the principle of impeachment was traced from the reign of Edward IV, for the purpose of shewing that in its relation to the effect of a dissolution, it was precisely the same for impeachments as for writs of error and appeal. Various instances were produced of writs of error not abating prior to 1673, and thence it was concluded that the report of the Lords' Committee, and the resolutions of the Lords at that time, which had remained unquestioned ever since, were founded on precedents, and what was clearly understood to be the practice of Parliament. That the report and resolution of 1678, respecting the continuance of an impeachment after a dissolution, were grounded upon that of 1673; because both impeachments and writs of error stood so strictly connected in principle, that it was impossible to make a distinction between them. That the resolution of 1673 could not have been adopted merely as a colourable foundation for the resolution of 1678, because when the former passed it was impossible that the case to which the latter applied, could have been foreseen; and that when the Earl of Danby applied to the Court of King's Bench to be bailed after the dissolution of Parliament, the Court recognized the doctrine, that the impeachment did not fall to the ground in consequence of the dissolution, as the known and established law of Parliament. On the precedent of 1685, by which the resolution, as far as it respected impeachments, was reversed, it was remarked, that its authority was of no avail, the Commons having been corruptly chosen and wholly devoted to the Court;—the principal evidence for the prosecution, Titus Oates, convicted of perjury, and consequently incompetent; and the resolution itself passed without any examination of precedents, not generally with express limitation to the particular case. Hence it was inferred, that from the cases of the Lords Salisbury and Peterborough, 1690, it was understood to be the law of Parliament, that impeachments do not abate by a dissolution; and after much delay and management, they were at last discharged  
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by a resolution strictly applicable to their particular case, and in no respect affecting the general question. Even the case of the Earl of Oxford, in the year 1717, would, as far as it proceeded, warrant a similar conclusion. It behoved the House to use the utmost circumspection, in ascertaining how far their right might be affected by the doubt which appointing a Committee to search for precedents would imply. The friends of Mr. Hastings should remember that his case was unconnected with the general question: that if it were proper for the House to proceed against him, the renewal of the impeachment would be a greater hardship than to take it up where it then stood; and that, at all events, neither the length of the proof, nor the magnitude of the crime, could, with any shadow of decency, be suffered to protect the criminal. The House was then earnestly advised not to put it in the power of the Crown to set aside an impeachment by a dissolution; or of the Lords, to defeat it by delay; which, as they might choose on what and how many days they would sit each session of Parliament, they might be able to do, were a dissolution not to carry it into effect. On the present occasion, it certainly was the duty of the House of Commons entirely to clear away all doubts which might have arisen concerning the nature, force, and extent of their own privileges; to stamp a double certainty upon the case in question; and thus, whilst they did honour to themselves, to confer one of the most important services in their power upon posterity. The question was no less, than whether the right of the Commons to impeach should exist; for it was ridiculous to affirm that the Commons had the right to impeach, if it was coupled with a power in the Crown to prevent the efficacy of an impeachment at any period, which might suit the purpose of the advisers of the King, and destroy it even in the moment of conviction and judgment.

That a right admitted and acquiesced in for centuries, was not to be supposed doubtful, because some ingenious men had endeavoured to bring into question, what their ancestors had agreed in for three hundred years; and if forced analogies and sceptical arguments, from vague and unsupported theories, were to be the grounds of appointing Committees of Enquiry into the privileges of the Commons, there was no right so established but might be called in question, and no privilege, however necessary, but might be disputed. Not a line in the Journals of the Commons could justify even a doubt; and if doubts were to be raised by investigation of the Lords Journals, no Member of that House would look into those Journals for the privileges of the Commons, nor ask the opinion of a House of Peers upon the extent of the Commons powers. They alone were competent to declare their own privileges; and there was an end of the power of impeachment itself, if they were to inquire of the Lords what were its limits, and calmly submit that important privilege to their sole determination.

determination. In this view of the subject, it was idle to search for precedents, because the principle was a matter of daily practice; for three years the House had gone on with the trial, from session to session, from prorogation to prorogation; and that in principle and in law, there was no difference between dissolution and prorogation, between a new session and a new Parliament. It had been admitted that the course of decisions of a competent court were sufficient to form the law; though it could never be admitted that any decision of the House of Lords could make the law. Their decisions, consistent with principle, were the best evidence of the law, which the House could not make by its resolutions. That very principle, however, proved the impeachment did not abate; for no course of decisions, not even one authority, could be produced for its abating, but the miserable decision of the year 1685, which was to be raked from the ashes in which it had lain ever since it had passed, despised and forgotten by the very men who made it; contaminated and disgraced by the miserable circumstances which gave it birth, and the disgraceful times in which it happened. That the question had been attempted to be reasoned, upon principle, upon analogy, and upon direct authority. It was too obvious that the Minister who committed a crime deserving of impeachment, would be the first to give himself indemnity, by the commission of a fresh crime. With regard to analogy, the foundation of analogical reasoning consisted in proving the admission of a principle in one instance, and drawing from thence an argument, that in similar proceedings, and in like cases, the same principle ought to be admitted. But it was remarkable that in all the analogies introduced into the debate, much care had been taken to fly from analogies to other judicial proceedings in the House of Peers; and to apply to supposed analogies drawn from other courts, and other proceedings founded upon other principles, and standing in circumstances entirely different and distinct from those in which the two Houses stood with regard to any proceeding before the House of Lords in its judicial capacity. Among other analogies, bills of attainder and other legislative proceedings had been alluded to, which were unquestionably abated and destroyed by a dissolution. But if there was any analogy between the two cases, the objection to the argument was, that it proved too much. Unfortunately, bills of attainder, like other legislative proceedings, ended with a session, and were destroyed by a prorogation, equally as by a dissolution. Where had the analogy lain for four years? Had the friends of Mr. Hastings been so negligent as not to remark the similarity between impeachments and bills of attainder till then? Or if they had remarked it, why did they not come forward with the analogy three years ago, convey the knowledge to the House, and inform them that they were prosecuting Mr. Hastings without any authority, because impeachments were like bills of attainder; and ended, as they did, with the session of parliament in which

which they commenced? That it never had been doubted within those walls, that impeachments continued from Parliament to Parliament. In truth it could hardly be said with fairness, that it had ever been doubted any where. Before the question was agitated with any party view, in the case of the Popish Lords; the great Lord Nottingham, a man eminently learned, to whom the profession of the law owed as much as to any man; who had done more to form and improve one branch of our law than all who had succeeded him;—that great Judge, in declaring the causes of holding the Parliament, and speaking for the Crown itself, had solemnly and deliberately been of opinion; that a dissolution made no alteration on an impeachment. Upon the meeting of Parliament in the year after the Popish Lords were impeached, addressing himself to the Commons, he informed them that the King had, during the dissolution of Parliament, been applied to, to liberate those Lords; but that he had thought it right to reserve them for justice, and desired the Commons to proceed speedily with their trials, that they might not suffer the miseries of indefinite confinement. Before he had directed the Commons to proceed upon the trials, he must have been of opinion that the trials were in existence. When the question came afterwards in the next session to be agitated, it was solemnly settled by the resolution of 1678, that the state of impeachments was not affected by dissolution of Parliament; not upon the spur of the occasion, but upon mature deliberation and enquiry; upon following up the principle which was firmly established in the year 1673, and which never since had been controverted. Much abuse had been thrown on the times about the year 1678. It was true they were times of much ferment, but it was to the fermenting of the great spirit of liberty at that time, that we owed our very existence, even the meeting in that House then to discuss that question. That some excesses might have been practised, could not be denied; and the particular existence of the Popish plot might be a chimera. But the fear of popery, and terror for the loss of liberty, were not at that time ideal fears. It was to the spirit of our ancestors then, and to the principles which they successfully maintained, that this country owed the Revolution, and the existence of the present family upon the throne of the kingdom. Let those times be what they might, the resolution in question was not tainted by any thing which might be bad in them. It had nothing to do with the Popish plot. The question was agitated in the impeachment of Lord Danby, impeached for crimes totally distinct from the plot, and decided by a House of Lords, certainly not particularly inimical to that Minister. After that period the question came again to be mentioned in the House of Commons. In one of the conferences with regard to Lord Danby, the Managers, among other things, reported, that one of the Lords had put the Commons in mind that  
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they had gained two great points in that Parliament, viz. that impeachments continued from Parliament to Parliament; and that the impeached Lord must withdraw. The Managers for the Commons replied, that those points were agreeable to the ancient law and rule of Parliament. The propriety and truth of that answer was not at the time questioned by any man. No one therefore could doubt what he found above one hundred years ago declared by great and able men, and admitted by the whole House of Commons, to be the ancient law and usage of Parliament. Upon that law, Lord Stafford was tried and executed; and in his case it was solemnly decided. Much had been said with regard to that trial, namely, that the witnesses were perjured, and that unfortunate nobleman had a hard fate. But if the witnesses were believed, the conviction was just; the other circumstances of the trial, and the mode in which it was conducted, were little liable to objection. The form of conducting a trial, the principles which directed it, the questions of law which arose in the course of it, were not to be set aside because the witnesses happened to be perjured, or even because an innocent man had lost his life by their being believed. That about the period when those things passed in Parliament, the question had more than once occurred in Westminster Hall, where it was equally admitted as law, that impeachments continued notwithstanding a dissolution. Lord Danby and the Popish Lords had applied to be bailed; if an idea had prevailed of the abatement of the impeachment, their application ought to have been to be discharged. But the Court would not even bail them, till Jefferies was made Chief Justice, Bailing was an affirmance of the commitment, and therefore a direct authority that the impeachment subsisted. Upon looking into the case of Fitzharris, there was ground to say, that the question had been solemnly determined by all the Judges of England. Fitzharris had been generally impeached by the Commons of high treason; no articles were presented against him; Parliament was dissolved. He was afterwards indicted for a special treason under an act of Charles the Second; he pleaded that he was impeached. In the course of the discussion of the plea, his Counsel often endeavoured to argue that impeachments continued from Parliament to Parliament. Had the law been clearly otherwise, it would have been easy to have told them, "What signifies all this argument? The impeachment is gone." So far from it, the Chief Justice studiously avoided that question; and when they were pressing to argue it, stopped them by telling them, that the only question before the Court upon the plea was, Whether a general impeachment for treason could be pleaded in bar of an indictment for the particular treason set forth? In the course of the trial, one of the Counsel for Fitzharris insisted that it had been, after the dissolution of Parliament, solemnly resolved by all the Judges, that the King could not proceed upon the indictments against the Popish Lords on  
account



account of the impeachments which were *then depending* against them: the chief answer made by the then Attorney-General was, that that was an extra-judicial opinion.—Though that opinion was extra-judicial, still it had all the weight of an opinion of the twelve Judges; an opinion which they could not have formed if they had not thought impeachments did not abate, and that a dissolution of Parliament had no effect whatever upon the state of an impeachment,

After all this, it might have been thought that the point was clear; but in the first day of the first Parliament of James the Second, in the moment of servility and adulation, the House of Lords thought proper to reverse the order of 1678, so far as related to impeachments, and next day to discharge the Papish Lords. If ever there was a time dangerous to the liberties of this country, it was that period: a weak and bigoted Prince upon the throne; a packed and garbled House of Commons almost named by the Crown, in consequence of the violent and arbitrary destruction of the charters of the different corporations; and a people broken-hearted and almost worn down in their repeated struggles with the Crown; added to all which, had the House of Commons been differently formed from what it was, to proceed with the prosecution was impossible. The principal witnesses were convicted of perjury; yet in such a time, and under such circumstances, even the then House of Peers was ashamed to declare the resolution of 1678 not to be law. On the very day in which that minister of wickedness Jefferies took his seat as a Peer, it was reversed, without putting any declaration in its place, without enquiry, without examination, without the knowledge of the Commons, and without daring to look in the face the very resolution which was attempted to be reversed; the Protest expressly stating, that it was not *even allowed to be read, through repeatedly called for*. That such a precedent, at such a time, and under such circumstances, was now gravely contended to be sufficient to overturn settled law, destroy every principle, and trample upon the privileges of the Commons. But had even that case been regarded and followed? The very man who made it deserted it. It had served his purpose, and was laid by for ever. Not many years afterwards, in 1688-9, Lord Salisbury and Peterborough were impeached; and after the dissolution they applied to the King's Bench to be bailed. Lord Holt was then Chief Justice, a man of as great and respectable character as ever sat upon the bench, but certainly not remarkable for his great respect for the privileges of the two Houses of Parliament. He was the friend, and had been the Counsel of Lord Danby. In his case he had had opportunity to consider the nature of impeachments; that very question must therefore have been before him, and he could not be ignorant of the resolution of

1685, which had liberated his client. Yet neither the Lords applying to be bailed, nor the Court in refusing to bail them, take the least notice of that order. Upon the authority of the case of Lord Stafford, (which certainly was not law if the order of 1685 was supposed to have had any operation) the Chief Justice and all the Judges refused to bail them; expressly grounding their judgment, and resting their opinion, on what had been determined at that trial, as having settled and fixed the law upon the point. Had either the Lords themselves, or the Judges, an idea that the resolution of 1685 had altered the law, would the one have totally forgotten in their application to the court, and the other totally neglected in their judgment, a solemn determination made only four years before, and within the positive knowledge of both the parties and the Judges? Upon the meeting of Parliament those Lords applied to the House of Peers, who, indeed, did appoint a Committee to search precedents, and did attempt to involve their case with that general question; but with that question their case had nothing to do. An act of general pardon had passed. A question was put to the Judges, whether their case fell within it. The Judges were of opinion, that if the offences were committed under certain circumstances, they were within the act; and on a subsequent day they were discharged. It was impossible to read the Protest, and not to see that the pardon was the ground of the discharge. The Protest states the proceeding to be extra-judicial and without proper parties; complains that the Commons were not heard, and that even the House had not been attended with precedents of the effect of pardon. Nothing could be more ridiculous than such a Protest, if the Lords had been discharged, because the impeachment was at an end. To have heard the Commons would have been impossible, no proceeding being in existence. To have enquired about pardons must have been idle, because the Lords were discharged on a separate and distinct ground. But had the precedent been followed since? The same person who had been impeached as Earl of Danby, was in 1695 impeached as Duke of Leeds; he lay under impeachment for five years, and through several Parliaments. How did it happen that he never claimed the benefit of the resolution of 1685? After five years and three dissolutions, the House of Lords took up his case, but did not declare that it had long been at an end. They acted upon it as a *pending* proceeding; and dismissed it; "*the Commons not prosecuting*;" which was a direct authority in the present case. About the same period (in the year 1701) Lord Holt had again occasion to consider the law of impeachments, in deciding the case of Peters and Bennet, reported in 12th Mod. Rep. 604—in which he declared, *that impeachments upon which some proceedings had been had, and Parliaments dissolved, might be continued in a subsequent Parliament*. Mr. Justice

Foster expressly states the case of Lord Salisbury, as grounded on the act of general pardon; and reasons from it in a manner which it was impossible he should have done, if he had been of opinion that his impeachment had been ended by a dissolution. To all these authorities, parliamentary and legal, nothing was opposed but the proceedings in 1685. That an attempt had been made to argue something from the Protest in the case of Lord Oxford, in the year 1717, urging that it must have been admitted in the debate, that dissolution would abate an impeachment. No such admission could be gathered from the Protest. It was true that it had been asserted by the Minority, who, from their own assertion, argued that a prorogation would equally abate it. That that Protest stated as a fact a matter notoriously untrue, viz. That dissolution and prorogation equally put an end to judicial, as to legislative, proceedings. Every one knew that judicial proceedings in the House of Lords abate neither by the one nor the other. But if any thing to the present argument was to be drawn from that Protest, it was, that both sides of the House were agreed that there was no difference between dissolution and prorogation; if so, as a prorogation did not put an end to an impeachment, neither did a dissolution.

It had been said that writs of error and other judicial proceedings had, till the year 1673, constantly abated by a dissolution; and that impeachments must do so too. At that very time it was equally held, that prorogation abated a writ of error; how then came it that impeachments continued from session to session? If the fact were true, it would prove that impeachments did not in former times abate, when writs of error did; or if it were admitted that the analogy was well founded, it would prove that when it came to be held that writs of error did not abate by dissolution, it ought equally to have been held so as to impeachments. The position that writs of error and appeals in ancient times abated by a dissolution, was not however well founded. The order of 1673 was not the result of the arbitrary will of the House of Lords, but the consequence of an investigation into what was the ancient course of proceeding in that House; and whoever would look at the cases quoted in the Report preceding the order of 1673, or would examine the numerous cases to be found in Lord Hale's book, or the rolls of Parliament, would see that the ancient course was to present a petition complaining of an erroneous judgment, in consequence of which a *scire facias* issued returnable at the next Parliament. So far was the proceeding from abating, that in the ordinary and regular course, the party was not compelled to appear and hear the errors till the next Parliament; which principle was not confined to proceedings in error alone, but extended itself to every judicial proceeding before the House of Lords, as

was evident from a bare inspection of the Report in the year 1673. That there was a case in Levinz Reports \*, (17th Charles II.) where it was expressly declared, that writs of error, and *scire facias* thereon, did not abate by prorogation. About the middle of the reign of James the First, a practice began, which became more frequent in the time of Charles the Second, of making writs of error returnable immediately, and making orders of the House of Lords for their hearing from time to time. It was then argued, that as those writs, and the appearance of the parties, were supported by orders of the House of Lords, and as all orders fell with a dissolution or prorogation, that the writs of error were at an end. In consequence of this reasoning, the Courts of Law held the writ to be abated; but so far were they from making any distinction between dissolution and prorogation, that all the cases which held those proceedings abated by a dissolution, were grounded on the case of Gonfalone and Heydon, which was the case of a dissolution. So far those cases were an authority to prove that there was no distinction between prorogation and dissolution, as to judicial proceedings. That when the House of Lords found the courts below proceeding in this course, they were driven to investigate the subject; the consequence was, the order of 1673; which order, it was true, extended only to prorogation; but the principle extended equally to dissolution, and was accordingly applied to that case, in the year 1678. Those orders again brought the law back to its ancient principle, and judicial proceedings in Parliament have ever since, as they had done in ancient times, continued undisturbed by a dissolution. The court in which they are, continues the same; the time of its meeting is fixed to a certain day by prorogation, to an uncertain one by a dissolution; but the court, the judges, and all the proceedings, remain untouched and unaltered. That there was no distinction in law between dissolution and prorogation. Lord Coke expressly says, that every new session is a new Parliament; and in that he has been followed, without contradiction or dispute, by every lawyer who has succeeded him. So far, therefore, as analogy to other judicial proceedings in the House of Lords could apply, that analogy was clearly in favour of the motion. That the present case had been attempted to be compared to abatements at common law by the death of the King; but in order to support that reasoning, recourse must first be had to fiction, and then to analogy. There was no possible resemblance between the death of the King and the dissolution of Parliament; and even if there were, it was unfair to reason from it. Abatement of judicial proceedings by demise of the Crown, was an anomalous proceeding; the general rule being, that the King never died, and from that

\* Pritchard's case, 1. Lev. 165.



it was an exception : the argument, therefore, ought to be drawn from the rule and not from the exception. Every person knew that in early times, the profits of courts of justice formed a considerable part of the royal revenue ; to increase which was equally the object of the King, and the Judges ; and the doctrine of abatement was encouraged and extended, even contrary to other principles. But admitting that those cases were not anomalous, and that some analogy might be drawn, still the argument was equally defective. The idea upon which suits abated by the death of the King, was a notion of personal trust and confidence granted by the King to particular judges ; the dissolution of Parliament, or the calling of another, neither gave nor entrusted any personal confidence whatever. It had been said that Commissioners of oyer and terminer, and the like, abated also by the death of the King, and that their proceedings were at an end by whatever destroyed their commission. There was in those cases, however, not only the notion of personal confidence from the person of the Crown, but also the very authority of the judges was conferred, created, and limited, by the commission itself. There was no analogy between a commission conferring a special authority, and a writ calling an existing inherent authority into exercise. Calling a Parliament conferred no authority ; dissolving it took away none ; the rights and powers of the peerage existed independent of the Crown and its powers, and when called into action, naturally returned to their former state. The calling of a Parliament was nothing more than appointing a time for the high Court of Peers to meet, without having the least operation upon its proceedings.

Considering the matter shortly upon principle, it was difficult to believe that to be law, which appeared so totally destructive of the necessary powers of the House of Commons. Impeachments were of no use, if they might be stopped at the pleasure of the person accused. They were naturally directed against Ministers, and men often in the possession of power. Could it be doubted, that he who had so advised the Crown to misuse its authority as to deserve an impeachment, would hesitate in advising a dissolution to save himself ? Would he who had risked every thing in the commission of one crime, doubt about the commission of another, to give himself security from the consequences of his former one ? There was no period of an impeachment in which it might not be done : the criminal might take the chance of an acquittal, and finding that likely to fail him, save himself by this mode. It was said he might be impeached again, at least ; the doctrine however went to throw open his prison-doors and to elude justice. Was it a thing unknown in the History of England, for a Minister to fly from the vengeance of Parliament ? Was it nothing that the means of escape were put in his power ? But suppose he did not fly, did he not return to the new Parliament with the same weapon in his hand,

to defeat and elude the justice of his country? The length of the present Trial had been complained of; but that length would be doubled, if it was held that the proceedings abated, unless it was also held that a criminal was to escape merely because it had been found necessary to dissolve the Parliament; or because a crime happened to be committed near the period when by law it would expire.

That the decision involved in it considerations of the first magnitude. The rights and privileges of Parliament were concerned, which must remain ever inviolably sacred, or our valuable and excellent Constitution be subverted and destroyed. Precedents had been consulted with laborious industry; but those adduced in favour of impeachments *abating* on a dissolution of Parliament, were in number so few, and of such questionable authority, as clearly to evince the *imbecility* of the position. Indeed if there were precedents which *clearly* established the point, they might be called upon to bow in silence to the authority, but should lose no time in providing some remedy against a practice, whose tendency was hostile to the privileges of the House, and destructive of the liberties of the country. The authority of such precedents no one would say ought to be relied on, in preference to that of the *fundamental principles* of the Constitution. But there existed no evidence of such a uniform rule of parliamentary practice. From a dispassionate review of the different precedents, it was asserted with confidence, and the sequel, it was trusted, would abundantly justify the assertion, that impeachments did continue *in statu quo* from Parliament to Parliament, notwithstanding the precedents so much insisted upon in support of an *abatement* of such proceedings by a dissolution. Cases perfectly in point might be adduced from the reigns of Richard the Second, and others; but it would be sufficient to insist on the case of the Duke of Suffolk, in the reign of Henry the Sixth, which indisputably proved that impeachments continued from one Parliament to another. By the resolution of the Lords in 1673, writs of error and petitions of appeal, were made to continue from Parliament to Parliament; but it had been contended, since no mention was made of *impeachments* in that resolution, that a dissolution of Parliament operated as an *abatement* of such proceedings. The very opposite conclusion was deducible from the Report of the Committee; which expressly stated, that *writs of error, petitions of appeal, and other businesses of a judicial nature*, ought not to be narrowed in their discussion, but to extend from Parliament to Parliament. Impeachments, therefore, as judicial proceedings, did not necessarily *abate* by a dissolution. In the order of 1678, *impeachments* were expressly mentioned, in common with writs of error and petitions of appeal, to continue from one Parliament to another. To that precedent, however clear and decisive, objections had been taken to invalidate its authority. First, it was affirmed to have been a very

*precipitate* proceeding. How could that objection apply? Did it refer to any new matter not included in the former resolution of 1673? Clearly not. That order was only a deduction from the principles already laid down in the former decision; it could not then be a *precipitate* measure. But the critical juncture of affairs, during the ferment of party violence and of civil contention, might probably, it was said, contribute materially to that resolution, which authorized the continuance of impeachments. That objection, too, must vanish the moment the circumstances of the times, when the decision in question took place, were contrasted with those of the subsequent period, when it was rescinded. In 1678, the proceedings of the Lords were not influenced by any particular reference to some matter then depending; it was a general order, that writs of error, petitions of appeal, and impeachments, should survive a dissolution of parliament. Nor was that measure the production of any party violence or animosity; it was an unanimous decision, founded on the resolution of 1673, to serve as a standing precedent for the conduct of future impeachments. But what was the case of the reversal of that decision in 1685, so much depended on as a precedent in favour of the abatement of impeachment by dissolution? Was it not at the era when James the Second, a bigoted and Popish Prince, had ascended the Throne; when the Parliament was *obsequiously* devoted to the will of the monarch; when the sacrifice of principle was required to be made, by the prejudices of the times; when certain Popish Lords were about to be solemnly impeached, who were the supposed favourites of the King? Under such circumstances, what was the conduct of Parliament? They might think compliance was better than resistance at such a period; and therefore determined, probably with the best intentions, to rid themselves of the impeachments in contemplation, by rescinding the order of 1678. The professed object of that reversal, then, was to screen the noblemen in question from the impending danger of impeachment. Against which of the decisions did the objection taken from the circumstances of the times apply most forcibly; to the order of 1678, or to its reversal in 1685? Unquestionably to the latter.—The next objection to the order of 1678 was taken from the case of Lord Stafford. How could that instance invalidate the authority of the precedent in question? Because it afforded an opportunity of appealing to the passions;—that, from an eloquent and pathetic description of the trial, conviction, and execution of that unfortunate nobleman, the Committee might infer the injustice of the principle of continuing impeachments. Was that a legitimate and conclusive argument? Would not such reasoning prove adverse to the cause attempted to be established? For, admitting the Parliament in that instance to have acted improperly by continuing an impeachment, might not another Parliament be equally culpable in dispensing with the  
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the continuance of such a proceeding? Suppose a delinquent impeached, the charges of crimination gone through, and a dissolution of Parliament to take place; would it not prove the extremity of injustice to stay the proceedings in such a case, by which the defendant would be precluded from entering on his defence, and judgment of crimination or acquittal could not pass without a renewal of the proceedings *de novo*? His innocence or guilt must remain a subject of much doubt and suspicion. Would it not therefore be infinitely more expedient and proper, for the honour and reputation of both parties, that such proceedings, conducted by one Parliament, should be resumed *in statu quo* by another? Upon such a liberal principle the accuser would have every fair opportunity of making good his charge; and the accused have equal liberty to establish his defence. Nothing short of that procedure could deserve the name of public justice. What, because the fate of one nobleman, from the continuance of impeachment, was supposed hard and oppressive, did it therefore follow that the exercise of such a privilege of the Commons, in every instance, would be attended with the same noxious consequences? If the abuse of an institution was a valid argument of its inutility, the objection might apply; otherwise pathetic expostulation would go for nothing; for in deciding upon the merit of a dry precedent, our passions ought not to interfere with our judicial deliberations. The validity of the order of 1678 stood therefore unimpeached; a precedent which neither eloquence nor sophistry could possibly invalidate.

That the case of Lords Salisbury and Peterborough, adduced as a precedent in favour of an *abatement* of impeachment by dissolution, was equally unfortunate; for there did not appear from the proceedings, any reference whatever, either to the order of 1685, or to any former decision on the subject. Nor did the impeachment of Sir Adam Blair and others apply. And as to the impeachment of Lord Danby, there could not remain a doubt as to the sentiments then entertained by Parliament; since he was clearly dismissed, because the Commons had declined the prosecution. Three dissolutions of Parliament had obtained, before he was discharged. It was evident, if a dissolution operated as an *abatement*, Lord Danby would have been dismissed on the first dissolution; nay, he would have been, upon that principle, discharged of course. But the case was quite otherwise; for Parliament was repeatedly dissolved, and Lord Danby as often detained; until at length, the Commons declining to prosecute, he was discharged; so that that impeachment *abated* by the act of the Commons, and not by the operation of a dissolution. In the cases of Lords Somers, Halifax, Portland, and the Duke of Leeds, the impeachments abated in the same manner; the Commons not prosecuting, the parties were discharged. On which side did the weight of evidence from precedents



deeds preponderate? Did not the scale fairly incline in favour of the continuance of impeachments from Parliament to Parliament? The right to prosecute an impeachment until judgment was obtained, was clear, unequivocal, and indisputable, even from the authority of those precedents. Parliament, it was urged, exercised two powers, legislative and judicial, each of which had separate and distinct limits and duration. The confusion of these powers was the principal source of all the doubts upon the present question. Lawyers had differed as much in their opinions respecting writs of error, and petitions of appeal, as of impeachments: and from such a collision of opposite sentiments, much satisfaction could not be expected. Reference should therefore be made to the clear and established principle of the Constitution, in order to remove every difficulty. Every act of legislation terminated by prorogation, as well as by dissolution; but no judicial act was influenced by either. Impeachment therefore being a judicial proceeding, could not be affected by prorogation or dissolution. In the case of writs of error, and of petitions of appeal, the process continued from session to session, and from Parliament to Parliament; much more necessary was it that the proceedings in an impeachment should also continue; for in the one case, there was only one individual against another; but in the other, the House of Commons, and all the Commons of Great Britain, were parties against a State delinquent. The impeachment in question was not the act of the late Parliament, but of the whole Commons of the realm, the proceeding being in the name both of Constituents and Representatives. It had been asked, If the House of Commons, in this instance, were the attorneys of the people? In one sense they were considered as agents, consulting their own judgment and discretion, in protecting the interests of their constituents; but they were not the attorneys of the people, as agents delegated with power, to act merely by the instructions of their constituents. An impeachment had been commenced by the Commons in the persons of their late representatives; such a proceeding ought not to be discontinued without due enquiry and deliberation; for the House stood in a similar situation with a successor to the King's Attorney General, who was always required to proceed, with all trials already commenced on the part of the King. In law, it had been said, there was no such body as the Commons of England recognized. Would any one draw such an absurd inference, from an accidental omission, that such a body had no real existence, which was to be regarded as the principal object of legislation in every civilized country? Our ancestors had, in their accustomed wisdom, sufficiently guarded against such a supposed solecism in politics, by ordering all supplies to be granted in the name of the Commons, as well as all impeachments to be laid in their name;—and when once a proceeding

ceeding assumed a judicial form, its existence no longer depended on the persons who were immediately concerned in its institution. That the House of Commons was only the legal organ of instituting impeachments, as the Attorney-General was of filing an information *ex officio*, or an indictment, in the name of the King. The public prosecutors in the one case were the Commons of the realm, and the King was the prosecutor in the other. From the consideration of the capacity in which the House, as a judicial body, acted in the conduct of impeachments, it followed, that their proceedings could not abate, or be affected, either by a prorogation or dissolution of Parliament.

That the authority of Lord Hale was to be distrusted in the present instance, since writs of error, petitions of appeal, and impeachments, were considered by him as legislative proceedings. All legislative proceedings unquestionably abated by prorogation, as well as dissolution; but impeachments, writs of error, and petitions of appeal, are judicial proceedings, which continue from session to session, and from Parliament to Parliament. The error of Lord Hale proceeded from his confounding the legislative with the judicial power, in parliamentary proceedings. Lord Holt entertained a different opinion on the subject, since he had argued from the case of Lord Stafford, as a weighty and irrefragable precedent, in favour of the continuance of impeachments, and other judicial proceedings, from one Parliament to another. Lord Chief Baron Comyns, an authority of the highest respectability in Courts of Justice, was also decided in his opinion on the subject; for, from a passage in his Digest\*, it appeared, not only that impeachments continued, but that they could be resumed and prosecuted, until judgment was obtained, notwithstanding any contingent interruption, from either prorogation or dissolution. Had such proceedings abated in consequence of such an event, it was evident that the course of public justice would be greatly interrupted. But there was neither precedent nor law which authorized such a deduction; and the continuance of impeachments was frequently rendered indispensably necessary, in order to produce a salutary operation, and to guard against their abuse. And if impeachments were allowed to be a branch of the judicial power, they must necessarily have the same operation with other acts of that power. Writs of error, petitions of appeal, as judicial acts, survived prorogation and dissolution; so also ought impeachments. To admit the continuance of the former, and insist on the abatement of the latter, by the operation of a dissolution, was the grossest absurdity; since, as judicial proceedings, they were branches of the same power, and their connection depended on a permanent union in principle.—That those who insisted upon the abatement of impeachments, were con-

\* §. V. c. 249, 250.

sistent,

assent, if they also insisted on the abatement of writs of error and petitions of appeal; but when once the continuance of the latter was allowed, and the abatement of the former contended for, in consequence of a dissolution, then it was evident that impeachments were made, in one instance, a branch of the judicial power; and in another, an act of the legislative, to serve some particular purpose. Such a confusion of the two parliamentary powers should be judiciously avoided, lest their proceedings, impeded by endless doubts and difficulties, might terminate in injustice to individuals, and eventually tend to subvert the constitution. That the power of impeachment was a privilege of the first consequence to the liberties of the country; it operated as a salutary check upon those in administration, and effectually guarded against every undue influence of the Crown, in the protection of State delinquency. Ought the event of an impeachment, then, to depend on the operation of a dissolution? If the exercise of that power were once to be influenced by such an event, there would be an end to official responsibility; the most flagrant acts of corruption, oppression, and injustice, would pass with impunity; for the party impeached might procure, by interest or influence, a dissolution of Parliament, in order to escape the punishment his offences might justly deserve. Voluntary exile was, indeed, too heavy a punishment for injured innocence to endure, to avoid an unjust impeachment; but for the guilty delinquent to enjoy such an indulgence, would be no punishment, but rather a reward. The abatement of impeachments therefore by dissolution of Parliament, would throw an insurmountable obstacle in the way of public justice, and deprive the House of a power the most formidable to a corrupt Administration.

The objection, that no man could be a Judge *de jure* in a Court without a competent knowledge of the whole proceedings, was admitted to be true, in an inferior Court of Judicature; but not applicable to the House of Lords, inasmuch as that Supreme Court was liable perpetually to change its Members. And supposing the new Members ignorant of the proceedings already had of the impeachment depending, what inconvenience could arise from that circumstance, when copies of the whole evidence were printed? They need only refer for requisite information to the Journals. They had a right to judge from the Minutes, on the fidelity and accuracy of which they might always depend, since they were distributed not only among those Peers who were present at the taking of the evidence, but among those who were absent, for their information. That an impeachment was an extraordinary case, which did not admit of being conducted by the same rules which governed an inferior Court of Judicature. In the one case, judgment was formed upon printed evidence; but in the other,  *viva voce* evidence was certainly requisite.

But. And were the rules of the Court of King's Bench to obtain in the House of Lords, the question would be wholly at an end, and the right of impeachment at once annihilated; since it were better to file an indictment in the one, than prefer an impeachment in the other. But the principle of impeachment was, to bring delinquents to justice, who would have escaped, if tried according to the ordinary rules of Courts of Judicature. That the practice of the House of Lords was incompatible with that of other Courts, in regard to *viva voce* evidence and decision, without separating. Notes were in constant practice; and written evidence consulted, without which it were impossible, in cases of impeachment, to reduce under one view the whole body of the evidence; for there were few instances in which impeachments did not occupy some days: written evidence was then as indispensable in a trial of ten days, as of three years. But it was said, that in a long impeachment, in consequence of the constant change of Members in the House of Lords, some who had been accusers became Judges. In reply it was observed, that there was no period of prorogation to which the same objection would not apply. The Members who were so circumstanced, certainly could not be deprived of their judicial powers; at the same time, the exercise and application of those powers remained at the sole disposal of their own feelings and consciences. It was an unavoidable circumstance incidental to the nature of such a proceeding as an impeachment, from which no danger of injustice could be apprehended with any shadow of reason.

That the Court in which the Trial had been conducted, was accessible to all; the reports and papers respecting the evidence were open to general inspection; so that it was entirely at the option, not only of every Member of the House of Commons, but also of every British subject, to remain in ignorance of any part of the proceedings. It was wished it should be understood by all, as an established and incontrovertible principle, that impeachments continued *in statu quo*; inasmuch as a contrary mode of proceeding would be attended with consequences destructive of the privileges of the House, as well as injurious to the party accused. If an offence, for instance, was committed, the conviction of which required proceeding by impeachment on the eve of a dissolution of Parliament, the prosecution might be postponed until the meeting of a new Parliament, in order to avoid a repetition of the proceedings; the consequence naturally to be apprehended would be, the escape of the delinquent. If, on the other hand, an impeachment had been carried on for such a considerable length of time as to exceed a dissolution of Parliament, the repetition of the proceedings in that case might materially impede the progress of other public business. The death of a witness, in the mean time might considerably affect the state of the evidence; and an impeachment, by that mode of proceeding,



proceeding, be converted into an engine of oppression and injustice. Suppose the party impeached to have made some progress in his defence, his accusers might possess sufficient influence to procure a sudden dissolution of Parliament; the consequence might be, a fresh accusation against him, fabricated out of his own defence. By such a nefarious proceeding, he might continue to be the object of public prosecution all his life, without the possibility of being pronounced either innocent or guilty. An impeachment, therefore, must continue *in statu quo* after a dissolution. The House of Lords could not proceed to judgment, unless the House of Commons prayed it; in like manner, as the Court of King's Bench, on a conviction on a criminal information or indictment preferred by the Attorney-General, would not give judgment until that officer came into Court and prayed it.—That in ancient days, the Parliament was dissolved, or expired, at the end of a single session; but as election petitions and other public business increased, it had been found necessary to increase the duration of Parliaments. And in defining the distinction of the rules of proceeding in the Courts of Law and the Court of Parliament, it was said, that in the former, the whole power of the Court was derived from the Crown; but in the Court of Parliament, all the power was derived from the People.

The House of Lords had been admitted to be a permanent Court of Judicature. In all impeachments, the accusing party virtually, though not identically, was the same after a dissolution as before; for it would be ridiculous to contend that the great body of the people, in whose name, and on whose behalf, the Articles had been carried up to the House of Lords, had sustained any material or assignable alteration. As no real change, then, had happened either in the tribunal or prosecutor, it was clear that what ever was actually criminal six months ago, had not become less criminal from the interval which had taken place. The primary law of right, the true object of all human legislation, and the criterion of its excellence, was neither to be affected by lapse of time, nor difference of situation; and upon what principles of reason, or of justice, should the chances of escape be multiplied to the guilty, or the tortures of imputed guilt prolonged to the innocent, because the King might be advised to call a new Parliament?

But there was another consideration, which arose out of the case of the Earl of Danby. That Minister had been impeached by the House of Commons in 1678, and, after considerable delays, had pleaded the King's pardon. Charles the Second told his Parliament, in the most express terms, that he had given Lord Danby his pardon under his broad seal: that if that pardon should be found defective in form, he would renew it, again and again, till it should be perfect; for he was determined to protect him, as he was not criminal (and his Majesty had assigned not a very constitutional

reason

reason for his innocence), having acted only in obedience to his orders. That was precisely the sort of case which an impeachment was peculiarly calculated to reach. The King could never regularly be answerable for the faults of his government. Ministers alone were responsible; and if they valued their reputation or their safety, would relinquish their situations, whenever the King should be resolved to act in contempt of their advice: the boasted right of impeachment, upon which the House of Commons so justly valued itself, would otherwise be a mockery. If the King, who was not amenable, could affectedly take the blame upon himself and protect his Minister by a pardon, corruption, and every species of political infamy, would be placed beyond the vengeance of an insulted nation. The House of Commons, in 1673, felt that if the plea of Lord Danby were allowed, it would undermine the right of impeachment; a right derived to them from their constituents; to be exercised for their benefit, and not for their own, any farther than as they were a part of, and not distinct from, the great body of the people. They had had no precedent of a plea of pardon, but they had what was better than precedent—they had good sense and principle to direct them. They resisted the validity of the plea with spirit and firmness; and as they were neither to be soothed nor intimidated, the King had recourse to his only chance of screening his favourite from justice, by dissolving the Parliament.—That the doctrine so properly contended for by the House of Commons in Lord Danby's case, had been afterwards solemnly established by an Act, which every one must consider as one of the most happy and sacred Acts of the Legislature, namely, the 12th and 13th of William the Third, (a) which had settled the succession to the Crown upon the House of Hanover; and had enacted, for the better securing the rights and liberties of the subject, that no pardon under the great seal *should be pleadable to an impeachment by the Commons.* But of what use was that salutary clause, if the King, who was restrained from the improper exercise of his prerogative in one mode, might eventually produce the same effect in another—by dissolving the Parliament? It was true, that in some respects the present times did not resemble those of Charles the Second, and that no man would be found rash enough to advise the dissolution of a Parliament for so infamous a purpose. And though the Legislature had wisely declined to mark out the exact limits within which the exercise of the Royal prerogative should be confined; yet the enlightened state of the country had sufficiently ascertained, for all wholesome purposes, the boundaries beyond which discretion would not incline it to proceed. Such was the fortunate, the glorious situation in which they were then placed; but, as the peculiar guardians of the rights and liberties of the people, their duty called upon them to extend their political views beyond the contracted space of

(a) c. 2. s. 3.

their own natural existence; and to take care that posterity should not suffer, because they felt and rejoiced in their own security.— That it had been well observed, in opening the business, that the House were in a Committee, in one of its great superintending capacities, namely, in the Committee of Courts of Justice: and it was the nature of the Court, and the circumstance of the House of Commons itself being the prosecutor, which could produce a doubt. But when the case was stated, it would prove more clearly the necessity of standing upon their privileges, and only admitting the precedents (not decisive) of other Courts, and of the House of Lords, as illustrative of the great constitutional question. Suppose the Court of King's Bench, which obtained jurisdiction in civil suits by the fiction of the defendant being in the custody of the Marshal of the Marshalsea; or the Exchequer, whose civil jurisdiction was obtained by feigning the plaintiff to be the King's debtor, were to say, "We will no longer admit the operation of those fictions; fictions which the wisdom of our ancestors had contrived in order to introduce powers equal and co-ordinate in the distribution of private justice, and to give three places, instead of the Common Pleas alone," "to decide on the property and personal rights of individuals;" whereby, among other wise regulations, justice had been brought to a higher degree of perfection in this country, than in any other in the civilized world; if the Judges of those Courts were to disregard those useful fictions, and thus abridge the means of justice, by shutting up two of the sources from whence it flows, would not the House of Commons inquire; would they not by their anathemas, either in the form of Resolution, of Address, of Impeachment, or some other constitutional mode of exercising their inquisitorial power, compel those Judges to do their duty? So in the present case; Could the Commons sit by and see their day of trial passed over unnoticed, the fiction of a dissolution operating, it was hoped inadvertently, on the Lords, to put the impeachment of a great State criminal aside, without enquiry and resolution, founded on their known and undoubted privilege? a privilege similar to that which founded their inquiries into the conduct of the inferior jurisdictions, and which only differed in this, that in the case of the Lords it was one supreme power in conflict with another, without any third authority to decide between them, and therefore more purely and emphatically, a question of privilege. That they stood upon the best and soundest precedent in the history of the Constitution, when they determined not to go into a Committee to enquire into precedents, where their privileges were clear and material. It had been agitated in 1679, whether a pardon was pleadable in bar of an impeachment. The Commons, when called upon by the Lords to argue the question at their bar, refused to argue it, because it was so clearly interwoven with the Constitution, and so essential a privilege, that to argue was to doubt; and to doubt, almost an abandonment

## COMMON LAW OF ENGLAND. III

ment of the right.—The resolution of 1673 was again adverted to. Upon the face of the order of the Lords to inquire in 1673; and on the Report and Resolution founded on that Report, a clear distinction was taken between the proceedings of the House of Lords in a judicial and in a legislative capacity. In particular the Report of the Committee said, that “*any business in which their Lordships act as a Court of Judicature, and not in their legislative capacity, continues in statu quo from session to session.*” And the Resolution on that Report said, that *businesses* continued.—What *businesses*?—Undoubtedly the businesses referred to by the Reporting Committee; of judicial, as contradistinguished from a legislative capacity. And that resolution, though proceeding on various precedents, did not make, but set forth the real constitution of the Court of the King in Parliament; which was the true, real foundation for the continuance of an impeachment; namely, that it was a constantly existing Court; and although from dissolution, or other cause, it might not be fitting to do justice, yet it was always open to receive appeals and writs of error. Many cases were in the law books, which shewed that a writ of error might be brought *ad proximum Parliamentum* during dissolution, as well as *ad proximam sessionem* during prorogation; which proved the Court of the King in Parliament, which was the Court in which the Commons impeached, as well as that in which error was tried, to be a constantly existing Court; which was also founded in the very origin and source of the Lords’ jurisdiction.—That the identity of Parliament was gone, and that the House sat under a new authority, was denied. The Lords, it was said, had been properly styled the *hereditary Judges* of the kingdom. Why?—Because they derived their jurisdictions from their patent of Peerage, not from the writ of summons on dissolution, or proclamation to meet in Parliament after prorogation. That the patent of Peerage, to the Peer and his heirs for ever, according to the nature of the limitation, gave to him and his heirs of full age, as each succeeded, a right to act as a Judge in that supreme Court of the King in Parliament. This was so clear a right, that no power could deprive him of it; for it was expressly laid down by Lord Coke, and admitted by every lawyer, that the Peer was intitled to his writ of summons to Parliament; and if not sent to him, he might go, demand, and take it from the office. That the writ, or patent, was the source of judicial power to the Peer and his heirs, for ever; who was thereby constituted an *hereditary Judge*; exactly as the writ or patent to a Judge in Westminster Hall, for life, and for the life of the King, gave judicial power to the Judge. The power once given, could not be taken away by the Crown, during the life and good behaviour of the Judge. That of the Peer only ended by extinction of the Peerage, or forfeiture to the laws. The Judge’s power ceased (before the first year of the present King,)



King) with the demise of the Crown; but the judicial authority of the Peer did not. Why?—Because it was hereditary. That is the seventh Report of Lord Coke, respecting the discontinuance of process by the demise of the Crown, it was expressly laid down, that process by the Sheriff of London does not abate, nor any heritable jurisdiction. Why?—Because the authority was independent of the Crown; whereas the proceedings in Westminster Hall did abate; subject, however, to revival. Why?—Because the authority which gave birth to the jurisdiction was gone; whereas the jurisdiction of the Lords was in perpetuity. No act of the King could take it away, no act of the King could therefore abate it. The authority was given with the patent of Peerage; the day or time to exercise it, by the writ of summons, to meet at the beginning of a Parliament; or of the proclamation, to meet at the beginning of a session. Thus the day of meeting appointed by the King, at pleasure, gave the time for exercising the jurisdiction of the Court, styled the Court of the King in Parliament; just as the common law, by giving the Term to the Judges of Westminster Hall, gave the time for exercising their judicial powers. The Judges in Westminster Hall could no more exercise jurisdiction *in Bank*, (interlocutory matters done in chambers being different) out of Term, than the Court of the King in Parliament could, when Parliament was in prorogation or dissolution. But the King could abridge neither jurisdiction, at the times allotted for it, by law and practice. He could not withhold a Judge, or impede a cause in the King's Bench; he could not dissolve a cause, or withhold a Peer in the Court of the King, in Parliament. In short, it was a Court perpetually existing; and Lord Hale, whose authority, had been so much relied on, on the other side, said in the case of *Sedgwick and Goston*, reported in 1st Modern (a) in the year 1673, that the Register of writs contains a *scire facias* for a writ of error *ad proximum Parliamentum*. The Lords therefore, when they resolved that judicial matters survived in *statu quo* from session to session, in 1673, considered session and Parliament (as it was) to be one and the same thing; not only on the force of the precedents there cited, but on the reason of the thing, derived from the nature of the jurisdiction; considering it as a Court, which though, like all other Courts, it had certain times of acting, yet, like all other Courts, it had a constant existence, and could not be annihilated. Historical anecdote ought to be consulted, in explaining decisions and precedents. Who would abandon history, as a mean of clearing doubtful cases? The characters of the Judges who decided, was material in the judgments of courts of law; so was the character of the times, in parliamentary precedents. On the precedent of 1673, history was silent; but the silence of history was an important ingredi-

(a) 106.—3. Keb. 256. S. C.

ent in the case of 1673. Research had been made in vain, into all the histories of the times, for the origin of that important resolution : but what had been looked for in vain in the histories of the times, had been found in the law books. From the Restoration, to the year 1673, it appeared by many of the law reporters, that many cases, respecting the operation of prorogation and dissolution, on writs of error and appeals, had taken place ; doubts had arisen, and the Courts knew not how to decide. The resolution of 1673 must therefore have been a rule to settle those doubts ; a rule, taking its rise, not out of impeachment, party agitation, or political spirit, but out of mere questions of private right and private property, uninfluenced by passion or violence. And what did that calm, mild, resolution, originating in peace, not springing from discord, mark out ? That the Court of the King in Parliament, was a constantly existing Court, whose judicial proceedings were not touched by the exertion of prorogation, but remained *in statu quo*, from session to session, which was the same as from Parliament to Parliament.

To rescue from abuse the resolution of 1678, it was said, that instead of being stated insidiously, it was stated fairly and correctly. Had the matter of impeachment been coupled with writ of error or appeal, it would have been insidious, because it would have been setting forth that as a principle, which was merely a conclusion. In that resolution it was fairly stated, held out singly, disunited from other judicial proceedings, in order to provoke consideration. It was desired by the Lords' resolution of 1678, that the Committee should, as well as writs of error, consider the state of impeachments ; and it was resolved upon the report, substantively and distinctly, that dissolution of Parliament did not alter the state of impeachments ; that is, that the continuance of impeachment after dissolution, was a corollary, flowing from the state of other judicial proceedings. As to their citing no precedent for the proceeding, the observation was equally without foundation. The Committee of 1678 referred to the Journal 1673 ; which states precedents, not only of civil cases, but, as had been observed, of criminal cases, and of criminal cases subsequent to the act of Henry the Fourth. Those antecedent, however, were as good authority to the present point, as those subsequent. The object of the act of Henry the Fourth was to abolish criminal proceedings before the Lords, at the suit of individuals ; till that time they were legal ; and by the precedents they appeared to have endured from Parliament to Parliament. At that time of day if they endured from session to session, they endured from Parliament to Parliament ; for it was admitted that in the early times of Parliament, there were no prorogations ; at least none appeared on record, previous to the reign of Philip and Mary. Those cases therefore, whether prior to or since the time of Henry the Fourth, established, that criminal proceedings begun in one Parliament,

were carried on in subsequent Parliaments, and did not abate. But it had been endeavoured to shew, that the Parliament of 1678 deserved no credit ! a Parliament which, next to that which settled the Revolution, and that which seated the House of Brunswick on the throne, deserved more of posterity than any Parliament on record. It was not right to consider Parliament by the character of the times, but by constitutional acts, in their legislative and deliberative capacity. In that view, there was not an important or material privilege of personal freedom, parliamentary independence, or constitutional principle, afterwards enacted and enforced at the Revolution, which was not enforced and carried by the House of Commons in 1678. All the seeds were sown in that Parliament, which afterwards grew to maturity. It passed the *habeas corpus* act ;—it resisted Lord Shaftesbury, who, as Chancellor, had attempted to regain the power of trying elections, and judging of the right of Members to their seats ; and thus, by a second struggle, fixed that invaluable privilege for ever. It resolved, not on precedent and record, but on the clear unalienable rights of a free constitution, and the independence of inquisitorial power (without which inquisitorial power was a mockery)—that a pardon was not pleadable in bar of an impeachment ;—that a Lord High Steward, an officer named by the Crown, was not a necessary part of the Court of the King in Parliament ; which, if it had been necessary, empowered the Crown to stop an impeachment *in limine*, by refusing to appoint that officer ; and lastly completed the great work of inquisitorial independence, by deciding that a dissolution did not annul an impeachment. The resolution of 1678, therefore, was not only sound and just in itself, but was the act of a Parliament, whose reputation stood as high, for constitutional doctrine, as any in the annals of our history. With regard to the precedent of 1685, if, instead of having passed in times when a servile House of Lords, and a packed House of Commons, chosen by boroughs deprived of their legal rights, acting under a bigoted and misguided Prince, that resolution had passed in the best of times, and under the most perfect Parliament, it would amount to no authority whatever ; because it only removed one resolution, without putting another in its place ; and in so doing left the principle entire, for it did not venture to affect other judicial proceedings. If so, it was like reversing a rule of court ;—(rules which Courts of Judicature were competent to make, to advance justice or regulate proceedings ;)—but which could neither make law nor annul it.

The cases at common law, confirmatory of the continuance of an impeachment, were again alluded to : and first, the case of Lord Danby, in Skinner's reports\*. In that case, Lord Holt was counsel at the bar, and Jeffries the Judge came down on purpose to do the

job of the day; and yet he, who was not fettered by any principle of duty, who could foresee all the consequences of admission, admitted that all that was done was to enlarge Lord Danby's custody, and that upon the meeting of the new Parliament, they might proceed to the trial of Lord Danby. So far there was the authority of Jeffries, that instrument of prerogative and oppression, that impeachment endured from Parliament to Parliament. The next case in the books (from Carthew's reports †), arose on the application of Lord Salisbury to be bailed, in 1696. Lord Holt, counsel for the prisoner in the former case, was now Chief Justice of the King's Bench, and presided at that application; and he, who knew exactly all that had passed, said, that commitments by the Peers endured from Parliament to Parliament; that Lord Danby being bailed to appear at the next session of Parliament, was an affirmation of the commitment, and a plain proof of the opinion of the Court at the time, that the commitment was not avoided or discharged by prorogation or dissolution. In rich Modern, 664, Lord Holt says (by way of illustration), "If an impeachment be in one Parliament, and some proceeding thereon, and then the Parliament is dissolved, and a new one called; there may be a continuance on the impeachment." Holt, who was counsel for the Popish Lords in 1679, had twice, as Chief Justice, delivered that doctrine; and was, perhaps, of all the Judges who ever sat in Westminster Hall, the Judge whose authority was of most importance in a point of Parliamentary privilege; he who had been led to a full consideration of the privileges of both Houses, and had opposed as a Judge in Westminster Hall the privileges of each (a). So that if any cases deserved authority, those deserved authority, as being delivered by a Judge, who had more means of information on the particular case, than any person of the times; who was not afraid of combating the privileges of either House of Parliament; whose authority therefore, on a question of that kind, might be deservedly reckoned higher than that of any Judge who had ever sat in Westminster Hall; because if he had prejudices, they were prejudices unfavourable to the privileges of Parliament, which set in opposition to the Courts of Westminster Hall.

It had been argued, that the present House of Commons must be supposed totally ignorant of the whole which had passed, and therefore incapable of going on with the prosecution. A great constitutional principle, however, was not to be decided by extreme and abstract cases, but by the real solid principles of reason and law, applied to the conduct of men; to the principles of the constitution, and the

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(a) See the case of the King v. Knollys, 1. Ld. Raym. 10. and Ashby and White, 2. Ld. Raym. 938. 6. Mod. 45.



existing state of things. Perhaps the best way of answering one extreme case, was by putting another. It was admitted, that prorogation did not annul an impeachment; yet, it required no stretch of imagination to put a case, where prorogation should work the exact physical impossibility of going on, which was not actually, but only politically true (if true at all) in the case of dissolution. Suppose Elizabeth, whose power as to holding Parliaments was not constrained by any act of the Legislature, instead of maintaining the consequence of this country among the other Powers of Europe (which created public necessities, and obliged her to hold Parliaments), had been, like her grandfather, Henry the Seventh, frugal, parsimonious, unambitious, living on the income of her Crown lands and hereditary revenue;—the Parliament which met at the beginning of her reign, might have been continued by prorogations to the end of it; and an impeachment might have taken place at the beginning, which, according to the necessary admission on the other side, must have survived to the last year of her reign, entire and unabated. During the three-and-forty years of that reign, it was hardly supposable, by the course of nature, but quite certain from the fluctuation of representation, that any one Member of the Parliament of the first year, would be in the Parliament of the last; yet the law was admitted to be, that the impeachment would not abate, provided the Parliament was prolonged for forty-three years by prorogation, but that forty days of dissolution annihilated it; yet the prorogation of forty-three years would leave no one Member, nor no one vestige or trace of the proceeding. That a dissolution leaves in Parliament in general, by all observation on changes in Parliament, all or most of the leading men; all whose situation leads them to conduct affairs, or guide the business of Parliament. From which extreme case was to be derived this important observation—the whole was a question of expediency. That the necessity of ending the impeachment did not arise from dissolution; because the new House of Commons, being still the legal organ of the people of England, who never die, could as well express their sense in the new, as in the former Parliament; and in a new Parliament, the same, or very many of the same persons were returned, who did know the facts, who had conducted the business, and therefore who could decide upon the expediency of proceeding; whereas, after a long prorogation, such as had been supposed, the Members being dead, gone, or retired, all memory and trace of the proceeding being obliterated, the expediency was to end it.

But conceding that prorogation did not annul an impeachment, had given up the question; for there was no distinction, in the opinion of lawyers, or in the thing itself, between prorogation and dissolution. Whether Parliament were considered according to its personal,

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sonal, deliberative, legislative, or judicial functions, dissolution and prorogation were the same. If either House of Parliament, in its deliberative capacity, was engaged in any investigation, dissolution put an end to the proceeding; so did prorogation. If a legislative act was in its progress, dissolution put an end to that measure of legislation; so did prorogation. During the session of Parliament, and coming and going, each Member had personal privilege; which privilege was put an end to by dissolution, as well as by prorogation. But as to judicial proceedings, it was the reverse;—they continued. A writ of error was, confessedly, not ended by prorogation; neither by dissolution. Why? Because prorogation and dissolution were the same in law. An appeal was not ended either by prorogation or dissolution. And the question now was, Whether an impeachment, that great act of inquisitorial power, which controuls Ministers and Judges, and protects the constitution,—in its nature judicial,—in its proceeding analogous to the trial of a Peer in a Court which never ceases to exist (though its time of acting might be interrupted at the will of the Crown), was to be an exception to this great general rule;—whether that, without which all the rest would be useless, should bend to a power, which shook none of the others;—whether, while a cause between two individuals resisted the storm of prerogative, and in the shape of a writ of error survived dissolution,—a cause instituted by the representatives of the Commons of England, for themselves and all the Commons of England, should give way to that power?

From the analogy of the death of the House of Commons to the demise of the Crown, it could not be argued that the record was gone; because on the demise of the Crown, the proceedings on an information or indictment only abated; the information itself remained. It was asked, What they meant to do with the record? Was it to remain unacted upon? Was the accused to remain for ever under it? or, Was there to be a *noli prosequi* by the Commons? or, Was there to be a proceeding? If a *noli prosequi*, of course it might as well abate; for whether a thing ended of itself, or could not be carried on from want of knowledge in the prosecutors, was one and the same thing. Was it to be carried on? If it was, that either supposed knowledge, or the means of acquiring it. But the record remained: and why should not the proceeding upon it remain? Because, by the demise of the Crown, proceedings on an information abated.—But what sort of proceedings? Those which were preparatory to trial; the plea, and what are called, in the language of Westminster Hall, the continuances;—proceedings merely preparatory to impanelling the jury. Whereas, in the case of that impeachment, the Lords were a jury impanelled to try the cause of Mr. Hastings;—a jury who did not fall within the rules of

other juries, but who were equally known to the constitution as those already described; and who could only be discharged from their duty, like all other juries, by a verdict. It could not with propriety be compared with the common trial by jury. When a jury was impanelled to try a cause, a Judge presided—the Judge took notes, but there was no stop to take down the question—no stop to receive the answer—no form which made the evidence, as it were, a record—all was done on the general impression, and, as it were, *uno flatu*. The jury could not separate till they had given their verdict; could neither eat, drink, nor take refreshment; and if they retired, must retire in custody of a bailiff, till they pronounced upon the prisoner whom they were impanelled to try. It was not so in the Court of the King in Parliament; there the Court adjourned and continued *de die in diem*,—*de sessione in sessionem*, and, as was contended *de Parlamento in Parlamentum*; and their proceedings and forms were all calculated to suit that constitution. The evidence was taken in a different manner. The question, instead of being asked of the witness, was put to the Court by the Manager; the Chancellor presiding, put the question to the witness; that question being first taken down by the clerk, who likewise, before another question was put, took down the answer given by the witness. Thus, not the general effect, but the precise terms were taken down, and preserved for the benefit of the Court; that as well those who were not present, as those who from death, creation, &c. found their way into the Court, might legally give judgment of condemnation or acquittal. Therefore, if the argument, founded on the demeanor of a witness not being seen by the prosecutors, had any foundation, it applied more strongly to the Court: for if a person might judge, who had not seen a witness examined, surely the prosecutor might ask for judgment, under similar circumstances.

Hence the Court in which the Commons impeached, was the Court in which a Peer was tried; the same Court which tried writs of error; which in no case required the King to supply it with powers to enable it to act; but possessed those powers inherently, in its own nature and constitution. The Crown gave it a day; but in the language of Mr. Justice Foster, it openeth at the beginning, and shutteth at the end of every session, as the King's Bench openeth and shutteth with the Term.

That in a question which concerned the safety and welfare of the people, every consideration, except what had a tendency to promote those great objects, became superseded: *Salus populi suprema lex, prima lex, media lex*. To those who were only ordinary Members of Parliament, the rights of the Commons were every thing. They took it for granted, that what they possessed in favour of their constituents, was lawfully possessed; that what was never disputed there, ought not to be disputed any where. They employed argument  
and

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and research to defend their right against those who attacked them, not to raise questions amongst themselves against themselves; or to furnish offensive weapons to their adversaries, by teaching them to doubt the legality of their best-founded claims.

That the Judges, in all the Courts, take notes, not only for their own use, but for the instruction of the Jury, and summing up of the evidence. It was singular, that things provided as aids to the known frailty of memory, should be alledged as reasons for rejecting memory so assisted. How came the memory to be worse for that, which was always done *in perpetuam rei memoriam*?

Charles II. himself, in his speech from the Throne, expressly said to his new Parliament, that he would not discharge the Earl of Danby, because he was under impeachment by the last Parliament, and ought to be tried in the new; a declaration which shewed that the King acted on the clear, known, recognized law, not on any claim of the Commons. The House afterwards took it up on the same ground. They sent word to the Lords, to remind them of the depending impeachment of Lord Danby. The Lords take it into consideration, and solemnly adjudge, that an impeachment is not discontinued by the dissolution of Parliament. It was not considered as a right regained or recovered; it was the clear, indubitable right of the Commons, in which the Lords acquiesced.

Were they satisfied with a bare acquiescence? When Lord Stafford was brought to trial, he pleaded the discontinuance. Did the Lords yield to it? They would not so much as suffer it to be argued. On the foundation of that privilege, Lord Stafford was tried, condemned, executed, and by the attainder his whole line of succession cut off. Should that which had been sufficient to attain and degrade for ever, one of the noblest families in the world, not be sufficient to support the right of maintaining a temperate process, for bringing to legal judgment one India delinquent?

The High Court of Impeachment was composed of the hereditary branch of the Legislature—the Lords of Parliament; whose authority did not depend on the sitting of Parliament, although during the sitting of Parliament they exercised their authority in judicial proceedings. Like the Judges between Term and Term, they did not in the recess exercise their functions, but in that recess their functions were not extinguished. The meeting of Parliament was to them, therefore, no more than notice from the Crown to proceed in the exercise of their privileges, but which the Crown could neither take away, abridge, nor render void. What was the case of the prosecutors, and what was the right? The prosecutors were the Commons of Great Britain, of whom the Commons House of Parliament was the organ and the instrument. The great constituent body of the people of England possessed the accusatory right of impeachment

incessantly;



incessantly ; a right necessarily and physically existing at all times ; which could neither be taken from them, nor abridged by any change which they might make in their agents the House of Commons, whom they chose to conduct such impeachment. If, therefore, neither the judicature, before whom the matter of impeachment was to be tried, nor the accusers on such impeachment, were either politically or physically annihilated by dissolution ; if it was true, that though the means of acting were for a time suspended, the right remained ;—it followed, that every judicial proceeding in which they happened to be engaged before such a suspension took place, revived on their meeting again in the proper capacity to put in motion their inherent rights ; and that during every such interval, every such proceeding must be still depending in the state in which it was left.

It was remarked as a singular circumstance, that when their own Journals were free from any opinion, much less any instance of denial, they should be referred to the Journals of the House of Lords, to learn what were the privileges of the House of Commons. That there was not one single *dictum* on the Journals of the House of Commons against the doctrine, not even a surmise. What was the popular argument advanced for the discontinuance of the impeachment ? Merely that the evidence could not be known to the accusers personally, and that they must trust to written minutes, of the truth of which they were uncertain. What was all this appeal to the heart, on the duty of hearing evidence *vivâ voce*, instead of reading it, when truly written ? Was it to be established as a principle, that to the pure administration of justice, memory must alone assist the judgment, unrefreshed by minutes ? If an impeachment should last the whole possible length of a Parliament, the memory must hold out, as they could not conscientiously demand judgment, if their recollection was assisted by referring to the notes which had been taken ; and unless they possessed memories of that retentive kind, they were to be deprived of all exercise of judgment. Why should they, who had only to make up their minds on the evidence, to justify them in demanding judgment, require more precise means of knowledge than the noble Lords who had to give judgment ? Why set up a wild theory against plain sense ? If they were not to judge on evidence so taken, in what a predicament did they place the Sovereign ? To him, both in the exercise of his gracious prerogative, that of mercy, as well as in that of his most afflicting duty,—enforcing the execution of justice,—the chief Magistrate of the kingdom had only written evidence, taken by others, to trust to. His Majesty could only judge from what he read, or from what he was told ; yet it was never imagined, much less imputed to the exercise of those Royal prerogatives, that the Royal judgment had been led by defective evidence ; which

which must be admitted, unless it should be stated that his Majesty was always, in fact, present in every Court, and master of every part of the evidence. Again were the times of Charles II. alluded to. They were not, it was said, bad times in parliamentary law, nor could any precedent derived from them be suspected merely on that account. The fact was, that the times, in a constitutional point of view, were good. All that could be charged upon them was their credulity. The people, harrassed and alarmed by repeated attempts on their liberty, were perhaps too ready to listen to those who wished to take advantage of their fears; but while some of their acts, viewed coolly, and at a distance, might be blameable, the principle on which they acted was good. The condemnation of Lord Stafford, viewed, as we were now enabled to view it, divested of fear and credulity, and convinced that Oates and Bedloe, the principal witnesses against him, were impostors, we must naturally lament. But every man who had perused the printed account of that trial, must admit that it was regular in form, and that the verdict of his Peers, believing, as they did, the evidence of Oates and Bedloe, was a just verdict, such as they were bound in conscience to pronounce. In those times, which were reprobated as incapable of affording a precedent fit to be followed, every question necessary to stop an impeachment, by the exercise of prerogative, had been tried; and all had been baffled by the vigorous and constitutional exertions of the Commons, and ever since completely settled. The King first tried to stop the impeachment by refusing to appoint a Lord High Steward. The Commons contested the point, agitated it with the Lords, and it ended in settling the commission of a Lord High Steward, by inserting words, which have ever since stood in the commission, and which make the Lord High Steward not a necessary part of the Court. Thus the Commons, without an act of Parliament, established that the King could not stop an impeachment by refusing to appoint a Lord High Steward; because that office was determined to be unnecessary. The King next tried to stop the impeachment by granting a pardon to Lord Danby. There again the prerogative of the King was routed by the privilege of the Commons. The Lords too disallowed the pardon, as a plea in bar; and such a measure had never since been attempted.

Disappointed in all those means of saving Lord Danby, the King resolved to dissolve the Parliament. Here again he was foiled. The new House of Commons took the business up with the spirit of the former; and arguing on the true principles of the constitution, enforced upon the soundest doctrine and clearest precedents, that notwithstanding dissolution, an impeachment remained *in statu quo* to be proceeded on by the new Parliament. The guilt of Lord Danby was, perhaps, as much the guilt of the King, as his own. The King had employed his favourite to sell the interest of his people to  
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a foreign power, and to barter away the dignity of his Crown for a disgraceful pension to himself. Implicated in the crime, he was naturally anxious to protect the instrument of it, and for that purpose resorted to every exercise of his prerogative, which the advice of his Minister, or his own ingenuity, could suggest. Every one of his measures on that occasion, had a direct parliamentary condemnation. Fortunate it was for the country, fortunate for posterity, that the King had had recourse to those manoeuvres; because it had been the means of establishing beyond a doubt, that no shift or evasion, no abuse of prerogative, no collusion between the Crown and the criminal, could defeat an impeachment by the Commons.

Of the times in which the resolution of 1678 was made, the opinion of men who spoke of them, without reference to any particular question, but on a general view of our history and constitution, would far outweigh all that had been said, as applicable to the present case. Judge Blackstone, whose opinion was justly in high esteem, had said, that the Parliament known by the name of the Long Parliament of Charles the Second, was deserving of the highest praise in a constitutional view. In the body of his work, he enumerates many different regulations, which were the work of that Parliament; and says they demonstrate this truth, "that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of King Charles the Second (g)." And in a note on that passage, he says, "The point of time at which I would chuse to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was passed, and that for licensing the press had expired; though the years which immediately followed "it were times of great *practical* oppression (b)."

In settling every contested point of law, we should first look to usage and then to reason. That there was a great distinction between the ordinary law, in the common courts of justice, and the constitutional law. For the former we should look to usage, where that could direct; but for the latter, to reason, in preference to usage; because in ordinary cases *certainty* was of more value than soundness of principle; but in constitutional law, soundness of principle was every thing. Certainty of usage, on a constitutional point, if it failed, served only to increase despair, and to drive to the last desperate remedy, for desperate cases. That the law of impeachment was not to be collected from the usage of courts of justice—for who was it meant to controul? Not only men in high stations, who might commit crimes which the common law could not reach; but first and principally, the courts of justice themselves. If the power of impeachment be rendered nugatory, what security is there for

(g) Com. 4. V. oct. 439.

(b) *Id.*

the integrity of Judges, and the pure administration of justice? Were it to be governed by absurd or iniquitous rules of practice, what abuse could it correct? They would not imagine extraordinary cases of enormity in Judges, but suppose them so devoted to the Crown, as to give such a decision as had been given in the case of *Ship-Money*. Suppose them, as in the reign of Charles II. so pliant to the prevailing party of the day, as to execute Whigs one day, and Tories the next, under colour of law, what remedy was left, if that of impeachment did not apply? Were a Judge even to attain to that enormous pitch of arbitrary wickedness, as to order a man to punishment who had been acquitted by a Jury, there was no mode of proceeding against him but by impeachment. With regard to the force of precedents on constitutional points, had the dispensing power claimed by the Stuarts been decided by precedent, it might, perhaps, have been found to be good. But would any man regard a precedent in such a case? Must it not be perceived, that a Legislature and a dispensing power in the Crown were things incompatible; and that wherever any usage appeared subversive of the constitution, if it had lasted for one, or for two hundred years, it was not a precedent, but an usurpation?

They were told they might proceed by a bill of pains and penalties. What, it was argued, would be gained by that, unless it could be made appear, that a bill of pains and penalties could not be stopped in its progress by the Crown? And though such abuses were not, in general, to be supposed, yet when controul was removed, all abuses were to be supposed. Again they were told, that if a Minister advised the Crown to dissolve the Parliament, to get rid of an impeachment, they might impeach him again. By the same rule he might advise to dissolve them again; and so they might go on, impeaching and dissolving alternately, with no other effect than a mockery of justice. It had also been said, that the points on which the law of Parliament turned, were of such nicety, that none but a lawyer could understand them. The supposed nicety proved the falsity of the argument. Were the case so, how could the law of Parliament be ever understood by men of common education and plain understanding? How could it have been established, by men of still more ordinary education, who composed the majority of the House of Commons, when the theory of the constitution was developed and explained? But they had, it seemed, no knowledge of the proceedings, on the impeachment, during the late Parliament;—there was no evidence on which they could judge, whether any thing had been proved by the Managers appointed by the late House of Commons. It was somewhat strange, that professional men should be so profoundly ignorant of what was known to all the world beside. They could listen only to oral evidence; the minutes of the evidence taken down and printed by direction



tion of the Lords for their own information, were to lawyers of no use whatever. That one learned gentleman, who unfortunately had not attended the trial; who had not heard the evidence; who had no materials on which to form his judgment; who could not suffer himself to read written minutes, of written evidence, such as composed the greater part of the evidence on the trial; and who was so conscientious, that he would not, as an accuser, pray judgment against a man who, for any thing he knew, might be innocent; had asked how he, as a Member of the House of Commons, could go to the bar of the Lords, and demand judgment against Mr. Hastings, supposing him to be found guilty? To this it was answered, that when that learned gentleman came to be Attorney General, he might with the greatest propriety move the Court of King's Bench for judgment against all persons so convicted by his predecessor in office; and that on much weaker evidence than the minutes of the impeachment; on no other evidence than a copy of the record; and when he came to be a Judge, might even pronounce judgment on what might be considered as still weaker evidence, namely, the notes of a brother Judge. It was well known that nine-tenths of misdemeanors were tried at sittings, and the record being returned to the Court from whence it issued, sentence was there pronounced, by Judges who had heard no part of the oral evidence—who had seen nothing of the demeanor of the prisoner, or the witnesses—who had no knowledge whatever of the case, or of its circumstances, but what they derived from the notes of the Judge who tried the cause. Affidavits, both in extenuation and aggravation, might be, and frequently were, produced and read; and on that sort of evidence, which was thus gravely represented by professional men as no evidence at all;—on the written evidence of a note book, with the addition sometimes of written affidavits; on evidence of such authority (which, if tho' few whose business it was to understand it best, were to be believed, ought not to be of force to pluck a feather from a sparrow's wing), would learned gentlemen, when advanced to the Bench, decide, whether a fellow-subject should be fined a shilling or ten thousand pounds—whether he should be imprisoned in the King's Bench for a week, or in Newgate for three years. That it had been asked, if all their proceedings did not cease with a dissolution? Precisely those, it was answered, which ceased on a prorogation. On a prorogation, all votes of money, all bills depending, fell to the ground. So they did on a dissolution. By prorogation, the state of an impeachment was not affected. No more was it affected by a dissolution. During the interval occasioned by either, the High Court of Parliament could not sit, any more than the Courts of Common Law, in the interval between Term and Term.

When

When Parliament met after either, judicial proceedings were taken up *in statu quo*, just as in the Courts below after a vacation. In this manner had the proceedings on the impeachment been suspended, by every prorogation of Parliament, and the Committee of Managers dissolved. After prorogation, the Committee had been re-appointed, and the proceedings on the trial resumed. That there was no difference between the present situation of the House, and its situation after any of the prorogations since the trial commenced;—except that having been sent back to their constituents, they might more properly review their former proceedings, to see what they would abide by, and what they would abandon. That by the act of 1773, for enquiring into offences committed in India, it was provided that various parliamentary proceedings, necessary for that purpose, should continue from Session to Session, and from Parliament to Parliament; but not one word was said of impeachments. That was no casual omission, but an omission on principle. It was in the contemplation of the framers of that act, to include impeachments; but on the advice of the late Mr. Dyson, whose knowledge of the law of Parliament had never been questioned, they were expressly omitted, that the undoubted right and privilege of the Commons might not be weakened, by an indirect admission on their own part that it was not clear.

It had been observed, that as the dissolution of Parliament was generally expected, those who conducted the impeachment, and were anxious that public justice should not be defeated, ought to have brought in a bill to continue the impeachment over the dissolution, when they saw that the trial could not be concluded before it. Those who said so, ought to recollect, that it was not the opinion of the Managers, that the impeachment would be affected by a dissolution. All which on them depended, the Managers had done. They had moved a resolution in the last Session of the late Parliament, that the Commons would persevere in the prosecution of the impeachment till the ends of public justice were obtained; and the resolution had been adopted by the House. What was the conduct of those who thought a dissolution would put an end to the impeachment? Did they apprise the House of it? No—When they saw the House voting that it would persevere in the impeachment, when they knew that a dissolution was approaching, which, in their opinion, must necessarily be fatal to it, instead of bringing forward their constitutional law for the information of the House, when such information might have been useful, they concealed it, and now, for the first time, brought it into action. They had on their own Journals an express declaration, that an impeachment did not abate by dissolution of Parliament; a declaration acquiesced in by the Lords, repeatedly acted upon by the Commons, and never once contradicted by any subsequent declaration; and it was strange indeed to hear those  
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who had laid it down as a principle, that an order of any competent Court, acquiesced in for a series of years, and never afterwards annulled, made law—advising the House of Commons to consult the Journals of the Lords, for the purpose of turning aside the clear and uniform stream of the law of Parliament, as it appeared on their own, for more than a century. Were any man to affirm, in defiance of the act of Queen Anne, that Parliament had no right to interfere with the descent of the Crown—that the act of settlement was not law, and that the House of Stuart, and not the House of Brunswick, had the only legal right to it—no one would feel an apprehension that the proposition might be true; but would desire time to recover from his astonishment, to repress the indignation which it must naturally excite, and to obtain for it such a free and temperate discussion, as might procure the most solid and effectual condemnation of a doctrine so absurd and extravagant. Such a discussion the question before the House had received; and great as were the advantages which the nation had derived from the accession of the House of Brunswick to the Throne, the decision of it was of as much importance to the constitution and the future happiness of the people, as whether the succession should continue in that House, or revert to the House of Stuart. That next to the independent, free-born spirit of the people, the law of impeachment was the best security for the undisturbed enjoyment of their lives and liberties. It was the only peaceable security against the vices of Government; and let no man, by weakening or annihilating that, reduce them to the necessity of having recourse to any other. To declare that an impeachment did not abate by dissolution of Parliament, with a view to prevent the improper interference of the Crown, had been called *muzzling the lion with a cobweb*. After the privilege was asserted and established, the King, it was said, might dissolve the Parliament, when the Lords were on the point of pronouncing a prisoner guilty, or after he had been found guilty and before judgment was given; and so afford him the means of escape; or, he might create fifty new Peers in a day, for the purpose of acquitting a state criminal. All this was undoubtedly true. Though every one would lament to see the power of creating Peers abused, yet they would much more lament to see that power taken away; and it was a possible evil, against which they could propose no remedy. But whenever ingenuity could point out some possible abuse against which they could not provide, were they to give up every security against that abuse, which the constitution had put into their hands. No human form of Government was ever yet so perfect, as to guard against every possible abuse of power; and the subjects of every

every Government must bear with some. But when abuses became so frequent, or enormous, as to be oppressive and intolerable, and to threaten the destruction of Government itself, then it was that the last remedy must be applied—that the free spirit of the people must put into action their natural power to redress those grievances, for which they had no peaceable means of redress, and assert their indefeasible right to a just and equitable Government. No man would deny, that cases might occur, in which the people could have no choice but slavery, or resistance; no man would hesitate to say what their choice ought to be; and it was the best wisdom of every Government, not to create a necessity for resistance, by depriving the people of the legal means of redress. The alternative every good man must deprecate, as too dreadful in its probable consequences; and whenever sad necessity should urge it on every individual, who had a heart to feel for the calamities of his country, must deplore the exigency of the times. Nevertheless, they were to watch possibilities in that House with the eye of jealousy; and should tyranny ever be enforced, no doubt the gentlemen of the Long Robe would contradict the sentiments which they had chosen to deliver, by their actions; and prove, by their zeal and activity, that they were as ready to lay down their lives in defence of their freedom, as any description of men whatever. That the right of impeachment proceeding, without abatement, from Session to Session, and from Parliament to Parliament—was the vital, the defensive principle of the constitution; which preserved it from internal decay; which protected it from internal injury; without which every office of executive power, every function of judicial authority, might be exercised or abused, at the discretion or caprice of him who held, or of him who had the right of appointing to it.

The motion was put, and carried, without a division (1). At a subsequent time, this important question was debated in the House of Lords, and was attended with the same success. On the 16th May 1791 it was moved, that “A Message be sent to the Commons to inform them that the Lords were ready to proceed on the Trial of Warren Hastings Esq.” which passed in the affirmative, by a majority of 43—Contents 66—Not Contents 18,—(2)

(1) Vide Parl. Reg. by Debreux, list of the precedents from 18 Ed. 1. 21. vol. fo. 190. where there is a list to 3 Geo. 1.

(2) *Ibid.* 30 vol. fo. 189.



AND thus much in general, touching the great regard that parliaments and the kingdom have had, and that most justly, to the common law; and the great care they have had to preserve and maintain it, as the common interest and birthright of the king and kingdom.

I SHALL now add some few words touching the stiles and appellations of the common law, and the reasons of it. It is called sometimes, by way of eminence, *lex terra*, as in the statute of *Magna Charta*, cap. 29. where certainly the common law is at least principally intended by those words, *aut per legem terra*; as appears by the exposition thereof in several subsequent statutes, and particularly in the statute 28. Edw. 3. cap. 3. which is but an exposition and declaration of that statute. Sometimes it is called *lex Anglia*, as in the statute of Merton, cap. 9. "*Nolumus leges Anglia mutari (1), &c.*" Sometimes it is called *lex & consuetudo regni*; as in all commissions of *oyer and terminer*, and in the statutes of 18. Edw. 1. cap. . . and *De Quo Warranto*, and divers others. But most commonly it is called the common law; or, the common law of England; as in the statute of *Articuli super Chartas*, cap. 15. in the statute 25. Edw. 3. cap. 5. and infinite more records and statutes.

Now, the reason why it is called the common law, or what was the occasion that first gave that determination to it, is variously assigned, viz.

FIRST, some have thought it to be so called, by way of contradistinction to those other laws that have obtained within this kingdom. As, first, by way of contradistinction to the statute law. Thus a writ of entry *ad Communem Legem*, is so

(1) Seld. Dissert. ad Fletam. 3 Inst. 208. Barring. on Stat. 44.

called in contradistinction to writs of entry in *Casu consimili*, and *Casu proviso*, which are given by act of parliament. Secondly, by way of contradistinction to particular customary laws. Thus descents at common law, dower at common law, are in contradistinction to such dowers and descents as are directed by particular customs. And thirdly, in contradistinction to the civil, canon, martial and military laws, which are, in some particular cases and courts, admitted as the rule of their proceedings.

SECONDLY, some have conceived, that the reason of this appellation was this, viz. In the beginning of the reign of Edward III. before the Conquest, commonly called Edward the Confessor, there were several laws, and of several natures, which obtained in several parts of this kingdom, viz. **THE MERCIAN LAWS**—in the counties of Gloucester, Worcester, Hereford, Warwick, Oxon, Chester, Salop, and Stafford: **THE DANISH LAWS**—in the counties of York, Derby, Nottingham, Leicester, Lincoln, Northampton, Bedford, Bucks, Hertford, Essex, Middlesex, Norfolk, Suffolk, Cambridge and Huntingdon: **THE WEST-SAXON LAWS**—in the counties of Kent, Sussex, Surrey, Berks, Southampton, Wilts, Somerset, Dorset, and Devon (m).

THI;

(m) The old laws of the Saxons make particular mention of the Danish, the Mercian, and the West-Saxon laws. And notwithstanding Sir Matthew Hale is supported by the authority of Camden, Spelman, Cowell, Selden, Du Fresne, Phillips, and Tyrrell, yet bishop Nicholson (Eng. Hist. lib. 1. 113. Scotch Hist. pref. 29) strongly contends that such a division of the English laws is merely imaginary. The bishop has

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taken great pains to define the genuine import of the word *laga*; and will have it, that *laga* (in composition with *Dæna*, *Mýrcena*, and *Westr Sexena*, in any of our Saxon remains) signifies properly a country, a district or a province, and that it cannot be otherwise rightly translated. Giving all due credit to the learning, to the industry and ingenuity of the bishop, it is certain that all our historians and antiquarians (himself alone

excepted)

THIS king, to reduce the kingdom as well under one law, as it then was under one monarchical government, extracted out of all those provincial laws, one law to be observed through the whole kingdom. Thus Ranulphus Cestrensis, cited by sir Henry Spelman in his Glossary, under the title *Lex*, says, *Ex tribus his Legibus Sanctus Edwardus unam Legem—&c.* And the same, in *totidem verbis*, is affirmed in his history of the last year of the same king Edward. (*Vide ibid. plura de hoc.*) But Hoveden carries up the common laws, or those stiled the Confessor's laws, much further. For in his History of Henry II. he tells us, *Quod istæ Leges prius inventæ & constitutæ erant tempore Edgari, avi sui, &c.* Vide Hoveden. And possibly the grandfather might be the first collector of them into a body, and afterwards Edward might add to the composition, and give it the denomination of the common law. But the original of it cannot in truth be referred to either, but is much more ancient, and is as undiscoverable as the head of Nile. Of which more at large in the following chapter.

THIRDLY, others say, and that most truly, that it is called the common law, because it is the common municipal law, or rule of justice, in this kingdom. So that *Lex Communis*,

excepted) are agreed that there was a threefold division of laws, out of which and other laws then extant, the Confessor made that collection which is called by his name, and which made one COMMON LAW; and that the proper definition of *laga* is *lex*, law. [Blackstone has followed this general received opinion. Com. i v. 65. Though these laws were somewhat different from each other, yet it must be admitted, that the difference for centuries chiefly

consisted in the various rates of mulcts or fines which were exacted from those who were guilty of certain crimes, according to the plenty or scarcity of money in their respective countries. They all held (says Spelman) "an uniformity in substance, differing rather in their mulcts than in their canon;—in the quantity of amercements, than in the course of justice." Reliquiz Spelm. 49.

or *Jus Communis*, is all one and the same with *Lex Patriæ*, or *Jus Patrium*. For although there are divers particular laws, some by custom, applied to particular places, and some to particular causes; yet that law, which is common to the generality of all persons, things, and causes, and has a superintendency over those particular laws that are admitted in relation to particular places or matters, is *Lex Communis Angliæ*; as the municipal laws of other countries may be, and are sometimes called, the common law of that country; as *Lex Communis Norrica*, *Lex Communis Burgundica*, *Lex Communis Lombardica*, &c. So that although all the former reasons have their share in this appellation, yet the principal cause thereof seems to be the latter: and hence some of the ancients called it *Lex Communis*; others *Lex Patriæ*; and so they were called in their confirmation by king William I. whereof hereafter (n).

(n) See Dr. Taylor's Elements of the Civil Law—a book of infinite learning, and which the inquisitive and industrious student will find of infinite advantage. Though Mr. Gibbon (speaking of that work) says it is “a work

of amusing, though various reading; but which cannot be praised for philosophical precision.” Gib. Hist. 8 v. oct. 66.—And in another place, (id. 77) he terms the author—“a learned, rambling, spirited writer.”



## C H A P. IV.

*Touching the original of the common law of England.*

**T**HE kingdom of England, being a very ancient kingdom, has had many vicissitudes and changes, especially before the coming in of king William I. under several, either conquests or accessions, of foreign nations. For though the Britons were, as is supposed, the most ancient inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and lastly, the Normans. And many of those foreigners were, as it were, incorporated together, and made one common people and nation. Hence arises the difficulty, and indeed moral impossibility, of giving any satisfactory, or so much as probable conjecture, touching the original of the laws, for the following reasons.

FIRST, from the nature of laws themselves in general; which being to be accommodated to the conditions, exigencies, and conveniences of the people, for or by whom they are appointed, (a) as those exigencies and conveniencies do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time. And hence it is, that though for the purpose in some

(a) *Inventæ sunt leges ad salutem civium, civitatum que incolumitatem, vitamque hominum & quietam & beatam. Cic. de Leg. l. 4. See Blac. Com. 1 v. 63. to 92 and 4 v. 409. Summam diviniæ mentis rationem, (says*

*Hopperus, of the law) et vocem cum bonitate et potentia conjunctam, quæ posita in Repub. jubet ea, quæ facienda sunt, et prohibet contraria. L. 1. de Vera Jurisprud. tit. 20.*

particular

particular part of the common law of England, we may easily say, that the common law, as it is now taken, is otherwise than it was in that particular part, or point, in the time of Henry II. when Glanville wrote; or than it was in the time of Henry III. when Bracton wrote;—yet it is not possible to assign the certain time when the change began. Nor have we all the monuments, or memorials, either of acts of parliament, or of judicial resolutions, which might induce or occasion such alterations. For we have no authentic records of any acts of parliament, before 9. Hen. III. and those we have of that king's time, are but few. Nor have we any reports of judicial decisions, in any constant series of time, before the reign of Edward I.; though we have the plea rolls of the times of Henry III. and king John, in some remarkable order. So that use and custom, judicial decisions and resolutions, and acts of parliament, though not now extant, might introduce some new laws, and alter some old, which we now take to be the very common law itself, though the times and precise periods of such alterations are not explicitly, or clearly known. But though those particular variations and accessions have happened in the laws, yet they being only partial and successive, we may with just reason say, they are the same English laws now, that they were, six hundred years since, in the general. As the Argonauts ship was the same when it returned home, as it was when it went out; though in that long voyage it had successive amendments, and scarce came back with any of its former materials;—and as Titius is the same man he was forty years since; though physicians tell us, that in a tract of seven years, the body has scarce any of the same material substance it had before.

SECONDLY, the second difficulty in the search of the antiquity of laws and their original, is in relation to that people, unto whom the laws are applied; which, in the case of

England, will render many observables, to shew it hard to be traced. For,

FIRST, it is an ancient kingdom. And in such cases, though the people and government had continued the same *ab origine*, as they say the Chinese did, till the late incursion of the Tartars, without the mixture of other people or laws; (*b*) yet it were an impossible thing, to give any certain account of the original of the laws of such a people; unless we had as certain monuments thereof, as the Jews had of theirs, by the hand of Moses (*c*). And that upon the following accounts. First, we have not any clear and certain monuments of the original foundation of the English kingdom, or state; when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional. And since we cannot know the original of the planting of this kingdom, we cannot certainly know the original of the laws thereof, which may be well presumed to be very near as ancient as the kingdom itself (*d*). Again, secondly, though tradition might be a competent discoverer of the ori-

(*b*) The Chinese are a very singular object for the attention of the world, as well on account of the extraordinary duration of their empire, as an unchangeable attachment to their maxims.—Attached to their ancient customs from taste, and to their ancient government from habit and from principle; they place their whole happiness in obedience; unwilling to quit their station, provided that their customs and their manners, which confirm the constitution of their country, be preserved to them; forgetting, however, that a slavish submission

to national customs, not only perpetuates national errors, but deprives a nation of numerous advantages.

(*c*) Blac. Com. 4 v. 409.

(*d*) The history of past events is immediately lost or disfigured when intrusted to memory, or to oral tradition. The only certain means by which nations can indulge their curiosity in researches concerning their remote origin, is to consider the language, the manners, and the customs of their ancestors, and to compare them with those of the neighbouring nations,

ginal

ginal of a kingdom or state, I mean oral tradition, yet such a tradition were incompetent without written monuments to derive to us, at so long a distance, the original laws and constitutions of the kingdom. Because they are of a complex nature, and therefore not orally traducible to so great a distance of ages, unless we had the original, or authentic transcript of those laws, as the Jews had of their law; or as the Romans had of their laws of the Twelve Tables, engraven in brass (e). But yet further, thirdly, it is very evident to every day's experience, that laws, the further they go from their original institution, grow the larger, and the more numerous. In the first coalition of a people, their prospect is not great; they provide laws for their present exigence and convenience. But in process of time, possibly, their first laws are changed, altered, or antiquated, as some of the laws of the Twelve Tables, among the Romans, were. But whatsoever be done touching their old laws, there must of necessity be a provision of new and other laws, successively answering to the multitude of successive exigencies and emergencies, that in a long tract of time will offer themselves. So that, if a man could at this day have the prospects of all the laws of the Britons, before any invasion upon them, it would yet be impossible to say, which of them were new and which were old; and the several seasons and periods of time wherein every law took its rise and original; especially since it appears, that in those elder times, the Britons were not reduced to that civilized estate, as to keep the annals and memorials of their laws and government, as the Romans and other civilized parts of the world have done. It is true, when the conquest of a country appears, we can tell when the laws of a conquering people came to be given to the conquered. Thus we can tell, that in the time of Henry II. when the conquest of Ireland had obtained a good progress, and in the time of king

(e) Blac. Com. 1 v. 8<sup>a</sup>. sec



John, when it was compleated, the English laws were settled in Ireland (*f*). But if we were upon this inquiry, "what were the original of those English laws that were thus settled there;" we are still under the same quest and difficulty that we are now, *viz.* what is the original of the English laws.—For they that begin new colonies, plantations and conquests, if they settle new laws, and which the places had not before, yet for the most part, I don't say altogether, they are the old laws which obtained in those countries from whence the conquerors or planters came.

SECONDLY, the second difficulty of the discovery of the original of the English laws is this:—That this kingdom has had many and great vicissitudes of people that inhabited it, and that in their several times prevailed and obtained a great hand in the government of this kingdom; whereby it came to pass, that there arose a great mixture and variety of laws; in some places, the laws of the Saxons; in some places, the laws of the Danes; in some places, the laws of the ancient Britons; in some places, the laws of the Mercians; and in some places, or among some people perhaps, the laws of the Normans. For although, as I shall shew hereafter (*g*), the Normans never obtained this kingdom by such a right of conquest as did or might alter the established laws of the kingdom; yet, considering that king William I. brought with him a great multitude of that nation, and many persons of great power and eminence, which were planted generally over this kingdom, especially in the possessions of such as had opposed his coming in, it must needs be supposed, that those occurrences might easily have a great influence upon the laws of this kingdom, and secretly and insensibly introduce new laws, customs and usages (*b*). So

(*f*) Cap. 9. (*g*) Cap. 5, 6. (*b*) Blac. Com. 4 v. 409.

that although the body and gross of the law might continue the same, and so continue the ancient denomination that it first had, yet it must needs receive diverse accessions from the laws of those people that were thus intermingled with the ancient Britons or Saxons. As the rivers of Severn, Thames, Trent, &c. though they continue the same denomination which their first stream had, yet have the accession of divers other streams added to them, in the tracks of their passage, which enlarge and augment them. And hence grew those several denominations of the Saxon, Mercian, and Danish laws, out of which, as before is shewn, the Confessor extracted his body of the common law. And therefore among all those various ingredients and mixtures of laws, it is almost an impossible piece of chymistry to reduce every *Caput Legis* to its true original; as to say, this is a piece of the Danish, this of the Norman, or this of the Saxon or British law. Neither was it, or indeed is it much material, which of these is their original. For 'tis very plain, the strength and obligation, and the formal nature of a law is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them; but they became laws, and binding in this kingdom, by virtue only of their being received and approved here (i).

THIRDLY, a third difficulty arises from those accidental emergencies that happened, either in the alteration of laws, or communicating or conveying of them to this kingdom. For first, the subdivision of the kingdom into small kingdoms under the Heptarchy, did most necessarily introduce a variation of laws; because the several parts of the kingdom were

(i) Law may be considered as a treaty to which the members of the same community have agreed, and under which the magistrate

and the subject continue to enjoy their rights, and to maintain the peace of society.

not

not under one common standard. And so it will soon be in any kingdoms that are cantonized, and not under one common method of dispensation of laws, though under one and the same king. Again, the intercourse and traffick with other nations, as it grew more or greater, did gradually make a communication and transmigration of laws from us to them, and from them to us. Again, the growth of Christianity in this kingdom, and the reception of learned men from other parts, especially from Rome, and the credit that they obtained here, might reasonably introduce some new laws; and antiquate or abrogate some old ones, that seem less consistent with the Christian doctrines. And by this means were introduced not only some of the judicial laws of the Jews, but also some points relating to, or bordering upon, or derived from the canon or civil laws; as may be seen in those laws of the ancient kings, Ina, Alfred, Canutus, &c. collected by Mr. Lambard (*k*).

HAVING thus far premised, it seems, upon the whole matter, an endless and insuperable business to carry up the English laws to their several springs and heads, and to find out their first original. Neither would it be of any moment or use if it were done. For whenever the laws

(*k*) That the civil law is intimately connected with the municipal jurisprudence in several countries of Europe, is a fact so well known, that it needs no illustration. Though our common law is supposed by some to form a system perfectly distinct from the Roman code, and however we may affectedly boast of the distinction, yet it is evident that many of the ideas and maxims of the civil law are incorporated in-

to the English jurisprudence. This is well illustrated by Mr. Barrington, *Observ. on Stat.* 76. seq. "The laws of all nations (said chief justice Holt) are doubtless raised out of the ruins of the civil law; it must be own'd that the principles of our law are borrowed from the civil law, and therefore grounded on the same reason in many things." 12 Mod. 482.

of England, or the several *Capita* thereof began; or from whence or whomsoever derived; or what laws of other countries contributed to the matter of our laws; yet most certainly their obligation arises not from their matter, but from their admission and reception, and authorization in this kingdom. And those laws, if convenient and useful for the kingdom, were never the worse, though they were defumed and taken from the laws of other countries; so as they had their stamp of obligation and authority from the reception and approbation of this kingdom, by virtue of the common law; of which this kingdom has been always jealous, especially in relation to the canon, civil, and Norman law, for the reasons hereafter shewn.

PASSING therefore from this unsearchable inquiry, I shall descend to that which gives the authority, viz. the formal constituents, as I may call them, of the common law. And they seem to be principally, if not only, those three, viz.

1. The common usage, or custom, and practice of this kingdom, in such parts thereof as lie in usage or custom;
2. The authority of parliament, introducing such laws;
- and, 3. The judicial decisions of courts of justice, consonant to one another, in the series and successions of time.

1. As to the first of these, USAGE AND CUSTOM generally received, *de obtinere vim Legis*, and is that which gives power, sometimes to the canon law, as in the ecclesiastical courts; sometimes to the civil law, as in the admiralty courts; and again, controuls both, when they cross other customs that are generally received in the kingdom. This is that which directs descents; has settled some ancient ceremonies and solemnities in conveyances, wills and deeds, and in many more particulars. And if it be enquired, what is the evidence of this custom, or wherein it consists, or is to be found?



found? I answer, it is not simply an unwritten custom, nor barely orally derived down from one age to another; but it is a custom that is derived down in writing, and transmitted from age to age; especially since the beginning of Edward I. to whose wisdom the laws of England owe almost as much as the laws of Rome to Justinian (1).

2. ACTS OF PARLIAMENT. And here it must not be wondered at, that I make acts of parliament one of the authoritative constituents of the common law, though I had before contradistinguished the one from the other. For we are to know, that although the original or authentic transcripts of acts of parliament are not before the time of Henry III. and many that were in his time are perished and lost; yet CERTAINLY SUCH THERE WERE; and many of those things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record (m). And if in the next age, the statutes made in the time of Henry III. and Edward I. were lost, yet even those would pass for parts of the common law. And indeed, by long usage and the many resolutions grounded upon them, and by their great antiquity, they seem even already to be incorporated with the very common law. That this is so, may appear, though not by records, for we have none so ancient, yet by an authentic and unquestionable history, wherein a man may, without much difficulty, find, that many of those *Capitula Legum* that are now used and taken for common law, were things enacted in parliaments or great councils under William I. and his predecessors, kings of England, as may be made appear hereafter. But yet, those constitutions and laws being made before time of memory, do now obtain, and

(1) Blac. Com. 1 v. 68.

348. 351. and the first chapter of

(m) Vide the case of Collins. this History, note (c).  
and Blantern, Wilf. par. 2. 10

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are taken as part of the common law and immemorial customs of the kingdom. And so they ought now to be esteemed, though in their first original they were acts of parliament.

3. JUDICIAL DECISIONS. It is true, the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attain; yet they do not make a law, properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, AS SUCH, whatsoever—(n).

FIRST, because the persons who pronounce those decisions, are men chosen by the king for that employment, as being of greater learning, knowledge, and experience in the laws than others. Secondly, because they are upon their oaths to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform their judgments. Fourthly, because they do *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided (o).

(n) An opinion, though erroneous, concluding to the judgment of a court, is a judicial opinion; because it is not only delivered under the sanction of the judge's oath, but on mature deliberation. But an extra-judicial opinion, whether given in or out of court, is no more than the *prolatum* of him who gives it; it

has no legal efficacy. So, an opinion given in court, if not necessary to the judgment, is extra-judicial. Vaugh. 382.

(o) Blac. Com. 1 v. 69. seq. Id. 267. Fortesc. de Laud. cap. 8. Seld. Review of Tith. cap. 8. 13 W. 3. cap. 2. 1 Geo. 3. cap. 23. and De Lolme, cap. 8.

Now

Now judicial decisions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds.

FIRST, they are either such as have their reasons singly in the laws and customs of the kingdom. As, who shall succeed as heir to the ancestor;—what is the ceremony requisite for passing a freehold;—what estate, and how much shall the wife have for her dower; and many such matters, wherein the ancient and express laws of the kingdom give an express decision, and the judge seems only the instrument to pronounce it. And in these things, the law or custom of the realm is the only rule and measure to judge by; and in reference to those matters, the decisions of courts are the conservatories and evidences of those laws.

SECONDLY, or they are such decisions, as by way of deduction and illation upon those laws, are framed or deduced. As for the purpose, whether of an estate thus, or thus, limited, the wife shall be endowed;—whether if thus, or thus limited, the heir may be barred; and infinite more of the like complicated questions. And herein the rule of decision is, first, the common law and custom of the realm, which is the great *substratum* that is to be maintained; and then authorities or decisions of former times, in the same or the like cases; and then the reason of the thing itself (*p*).

THIRDLY, or they are such as seem to have no other guide but the common reason of the thing, unless the same point has been formally decided. As in the exposition of the intention of clauses in deeds, wills, covenants, &c. where the very sense of the words, and their positions and

(*p*) This source of decision is called "*præteritorum memoria*  
"*eventorum*."

relations,

relations, give a rational account of the meaning of the parties. And in such cases, the judge does much better herein, than what a bare grave grammarian, or logician, or other prudent man could do. For in many cases there have been former resolutions, either in point, or agreeing in reason or analogy with the case in question; or, perhaps also, the clause to be expounded is mingled with some terms or clauses that require the knowledge of the law, to help out with the construction or exposition. Both which do often happen in the same case, and therefore it requires the knowledge of the law, to render and expound such clauses and sentences. And doubtless a good common lawyer is the best expositor of such clauses, &c. (9).

(9) Plowd. 122. seq. 140. seq. Thus the practice and decisions of courts acquire the authority of laws; every proceeding is conducted by some fixed and deter-

minate rule; and the best and most effectual precautions are taken for the impartial application of rules to particular cases.



# THE HISTORY OF THE MOO

## CHAP. V.

*How the common law of England stood at and for some time  
after the coming in of king William I.*

**I**T is the honour and safety, and therefore the just desire of kingdoms that recognize no superior but God, that their laws have these two qualifications. First, that they be not dependent upon any foreign power; for a dependency in laws, derogates from the honour and integrity of the kingdom, and from the power and sovereignty of the prince thereof. Secondly, that they taste not of bondage or servitude; for that derogates from the dignity of the kingdom, and from the liberties of the people thereof.

IN relation to the former consideration, the kings of this realm, and their great councils, have always been jealous and careful, that they admitted not any foreign power; especially such as pretended authority to impose laws upon other free kingdoms or states; nor to countenance the admission of such laws here, as were derived from such a power.

ROME, as well ancient as modern, pretended a kind of universal power and interest; the former by their victories, which were large, and extended even to Britain itself; and the latter, upon the pretence of being universal bishop, or vicar general, in all matters ecclesiastical. So that upon pretence of the former the civil law, and upon pretence of the latter the canon law, was introduced, or pretended to  
some

some kind of right, in the territories of some absolute princes, and among others here in England. But this kingdom has been always very jealous of giving too much countenance to either of those laws, and has always shewn a just indignation and resentment against any incroachments of this kind, either by the one law or the other. It is true, as before is shewn, that in the admiralty and military courts, the civil law has been admitted, and in the ecclesiastical courts, the canon law has been, in some particulars, admitted: but still they carry such marks and evidences about them, whereby it may be known that they bind not, nor have the authority of laws from themselves, but from the authoritative admission of this kingdom.

AND as thus the kingdom, for the reasons before given, never admitted the civil or the canon law to be the rule of the administration of common justice in this kingdom; so neither has it endured any laws to be imposed upon the people by any right of conquest; as being unsuitable to the honour or liberty of the English kingdom, to recognize their laws as given them at the will and pleasure of a conqueror. And hence it was, that although the people unjustly assisted king Henry IV. in his usurpation of the crown, yet he was not admitted thereunto, until he had declared, that he claimed not as a conqueror (*a*), but as a successor (*b*). Only he reserved to himself the liberty of extending a pretence of conquest against the Scroops, that were slain in battle against him; which yet he durst not

(*a*) His right as a conqueror was never avowed, it was only insinuated.

(*b*) See Knyghton 2757. Henry patched up a title in the best man-

ner he could; and in the end, he left himself, in the eyes of men of sense, no foundation of right, but his possession.

rest upon without a confirmation in parliament. *Vide Rot. Parl. 1 H. 4. No. 56. & Pars 2. ibid. No. 17. [A]*

[A] It is without question that Henry IV. claimed not the crown as a conqueror, though he was very much inclined so to do (a), but as a successor, by descent, from the right line of the blood royal.

In order to this he set up a shew of two titles : the one, upon the pretence of being the first of the blood royal, in the entire male line, whereas the duke of Clarence left only one daughter Philippa ; from which female branch, by a marriage with Edmond Mortimer, earl of March, the house of York descended : the other, by reviving an exploded rumour, first propagated by John of Gaunt, that Edmund earl of Lancaster, to whom Henry's mother was heiress, was in reality the elder brother of king Edward I. though his parents, on account of his personal deformity, had imposed him on the world for the younger ; and therefore Henry would be intitled to the crown, either as successor to Richard II. in case the entire male line was allowed a preference to the female ; or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

However, as in Edward the Third's time we find the parliament approving and affirming the law of the crown, so in the reign of Henry IV. they actually exerted their right of new settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2. whereby it is enacted, " that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be set and remain (b) in the person of our sovereign lord the king, and in the heirs of his body issuing ;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's sons, and the heirs of their bodies respectively. Which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however serves to shew, that it was then generally understood, that the king and Parliament had a right to new-model and regulate the succession to the crown. And we may observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However, sir Edward Coke more than once expressly declares (c), that at the time of passing this act, the right of the crown was in descent from Philippa, daughter and heir of Lionel duke of Clarence (d).

(a) Seld. Tit. Hon. 1 3. (b) Soit mys et demourge. (c) 4 Inst. 37. 203.

(d) Blac. Com. 1 v. 202.

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AND upon the like reason it was, that King William I. though he be called the Conqueror, and his attaining the crown here, is often in history, and in some records, called *CONQUESTUS ANGLIÆ*; yet in truth it was not such a conquest as did, or could alter the laws of this kingdom; or impose laws upon the people *per modum conquestus*, or *jure belli*. And therefore, to wipe off that false imputation upon our laws, as if they were the fruit, or effect of a conquest, or carried in them the badge of servitude to the will of the Conqueror, which notion some ignorant and prejudiced persons have entertained; I shall rip up and lay open this whole business from the bottom, and to that end enquire into the following particulars, viz.

FIRST, of the thing called conquest; what it is when attained; and the rights thereof.

SECONDLY, of the several kinds of conquest, and their effects, as to the alteration of laws by the victor.

THIRDLY, how the English laws stood at the entry of king William I.

FOURTHLY, by what title he entered: and whether by such a right of conquest as did, or could, alter the English laws.

FIFTHLY, whether *de facto* there was any alteration of the said laws, and by what means, after his coming in.

FIRST touching the first of these, viz. conquest, what it is when attained, and the rights thereof. It is true, that it seems to be admitted as a kind of law among all nations, that in case of a solemn war between supreme princes, the conqueror acquires a right of dominion, as well as a property over the things and persons that are



fully conquered (c). The reasons assigned are principally these, viz.

FIRST, because both parties have appealed to the highest tribunal that can be, viz. the trial by war; wherein the great Judge and Sovereign of the world, the Lord of Hosts, seems in a more especial manner than in other cases, to decide the controversy. Secondly, because unless this should be a final decision, mankind would be destroyed by endless broils, wars, and contentions; therefore, for the preservation of mankind, this great decision ought to be final, and the conquered ought to acquiesce in it (d). Thirdly, because if this should not be admitted, and be, as it were, by the tacit consent of mankind, accounted a lawful acquisition, there would not be any security or peace under any government. For by the various revolutions of dominion acquired by this means, have been, and are to this day, the successions of kingdoms and states preserved. What was once the Romans, was before that the Grecians; and before them, the Persians; and before the Persians, the Assyrians. And if this just victory were not allowed to be a firm acquiescence of dominion, the present possessors would be still obnoxious to the claim of the former proprietors, and so they would be in a restless state of doubts, difficulties, and changes, upon the pretension of former claims; therefore, to cut off this instability and unsettledness in dominion and property, it would seem that the common consent

(c) In the opinion of Grotius, he may impose subjection upon the whole body, whether it be a state, or only part of a state; and whether that subjection be civil, mixt, or despotick. *De Jure Belli ac Pacis* l. 8. c. 8. Seneca makes use of this argument in the controversy *de Olynthio*.—Vide Con-

trovers. 2 v. Contr. xxxiv. 390. edit. Gron. Major.

(d) See the Dissertation of Cocceius *de Jure Victoriz Diverso a Jure Belli*, sect. 23. but Freuer has attempted to refute the opinion of Cocceius, in his notes upon Puffendorf *de Offic. Hom. & Civ.* l. 2. c. 16. sect. 13.

of all nations has tacitly submitted, that acquisition by right of conquest, in a solemn war between persons not subjects of each other by bonds of allegiance or fidelity, should be allowed as one of the lawful titles of acquiring dominion over the persons, places and things so conquered.

BUT whatever be the real truth or justice of this position, yet we are much at a loss touching the things in *hypothesi*; viz. whether this be the effect of every kind of conquest? Whether the war be just or unjust? What are the requisites to the constituting of a just war (e)? Who are the persons that may acquire? and, What are the solemnities requisite for that acquiescence? But above all, the greatest difficulty is, When there shall be said such a victory as acquires this right? Indeed if there be a total deletion of every person of the opposing party or country, then the victory is complete, because none remains to call it in question. But suppose they are beaten in one battle, may they not rally again? or if the greater part be subdued, may not the lesser keep their ground? or if they do not at the present, may they not in the next age regain their liberty? or if they be quiet for a time, may they not, as they have opportunity, renew their pretensions? And although the victor, by his power, be able to quell and suppress them, yet he is beholden to his sword for it; and the right that he got by his victory before, would not be sufficient, without a power and force to establish and secure him against new troubles. And on the other side, if those few subdued persons can by force regain what they once had a pretence to, a former victory will be but a weak defence; and if it would, they would have the like pretence to a claim of acquiescence by victory over him, as he had over them.

(e) Of a just and solemn war, see Grot. l. 3. c. 3. according to the right of nations,

It seems, therefore, a difficult thing to determine, in what indivisible moment this victory is so complete, that *jure belli*, the acquirement of dominion is fully gotten. And therefore, victors are used to secure themselves against disputes of that kind; and as it were to under-pin their acquirement *jure belli*—(that they might not be lost by the same means whereby they were gained)—by the continuation of eternal forces of standing armies, castles, garrisons, munitions, and other acts of power and force; so as thereby to over-bear and prevent an ordinary possibility of the prevailing of the conquered or subdued people against the conqueror or victor. He that lays the weight of his title upon victory or conquest, rarely rests in it, as a complete conquest, till he has added to it somewhat of consent or faith of the conquered, (*f*) submitting voluntarily to him. Then, and not till then, he thinks his title secure, and his conquest complete. And indeed, he has no reason to think his title can be otherwise secure; for where the title is merely force or power, his title will fail, if the conquered can with like force or power over-match his, and so regain their former interest or dominion.

Now this consent is of two kinds, either expressed, or implied.

An express consent is, when after a victory, the party conquered do expressly submit themselves to the victors, either simply or absolutely;—by dedition, yielding themselves, giving him their faith and their allegiance; or else, under certain pacts, conventions, agreements, or capitulations. As when the subdued party, either by themselves, or by substitutes, or delegates by them chosen, do yield their faith

(*f*) In such case the acquisition is lawful, and that whether the war be just, or unjust. *Groz.* l. 3. c. 8. sect. 1. note 1. l. 3. c. 19. sect. 11. note 1. *Puffendorf,* l. 3. c. 8. sect. 1.

and their allegiance to the victor, upon certain pacts or agreements between them; as, for holding or continuing their religion, their laws, their form of civil administration, &c.

AND thus, though force were perhaps the occasion of this consent, yet in truth it is consent only that is the true proximate and fixed foundation of the victor's right; which now no longer rests barely upon external force, but upon the express consent and pact of the subdued people. Consequently, this pact or convention is that which is to be the immediate foundation of that dominion. And upon a diligent observation of most acquiescences gotten by conquest, or so called, we shall find this to be the conclusion of almost all victories; they end in deditions and capitulations, and faith given to the conqueror; whereby oftentimes the former laws, privileges, and possessions are confirmed to the subdued, without which the victors seldom continue long or quiet in their new acquiescences, without extreme expence, force, severity, and hazard.

AN implied consent is, when the subdued do continue for a long time quiet and peaceable under the government of the victor; accepting his government; submitting to his laws; taking upon them offices and employments under him; and obeying and owning him as their governor, without opposing him, or claiming their former right. This seems to be a tacit acceptance of, and assent to him. And though this is gradual, and possibly no determinate time is stinted, wherein a man can say, this year, or this month, or this day, such a tacit consent was completed and concluded;—for circumstances may make great variations in the sufficiency of the evidence of such an assent;—yet by a long and quiet tract of peaceable submission to the laws and go-



verment of the victor, men may reasonably conjecture, that the conquered have relinquished their purpose of regaining by force, what by force they lost.

BUT still all this is intended of a lawful conquest by a foreign prince or state, and not an usurpation by a subject, either upon his prince or fellow subjects. For several ages and descents do not purge the unlawfulness of such an usurpation.

SECONDLY, concerning the several kinds of conquests, and their effects, as to the alteration of laws by the victor. There seems to be a double kind of conquest, which induces a various consideration touching the change of laws; viz. *victoria in regem & populum, & victoria in regem tantum.*

THE conquest over the people or country, is when the war is denounced by a prince or state foreign, and no subject; and when the intention and denunciation of the war is against the king and people or country; and the pretension of title is by the sword, or *jure belli*. Such were most of the conquests of ancient monarchs, viz. the Assyrian, Persian, Grecian, and Roman conquests. And in such cases, the acquisitions of the victor were absolute and universal. He gained the interest and property of the very soil of the country subdued; which the victor might, at his pleasure, give, sell, or *arrent*. He gained a power of abolishing or changing their laws and customs; and of giving new, or, of imposing the law of the victor's country. But although this the conqueror might do, yet a change of the laws of the conquered country was rarely universally made, especially by the Romans; who, though in their own particular colonies, planted in conquered countries, they

they observed the Roman law; which possibly might by degrees, without any rigorous imposition, gain and insinuate themselves into the conquered people, and so gradually obtain, and insensibly conform them, at least so many of them as were *contiguous* to the colonies and garrisons, to the Roman laws;—yet they rarely made a rigorous and universal change of the laws of the conquered country, unless they were such as were foreign and barbarous, or altogether inconsistent with the victor's government. But in other things, they commonly indulged unto the conquered, the laws and religion of their country, upon a double account, viz.

FIRST, on account of humanity; thinking it a hard and over-severe thing, to impose presently upon the conquered, a change of their customs, which long use had made dear to them. And, secondly, upon the account of prudence; for the Romans, being a wise and experienced people, found that those indulgencies made their conquests the more easy, and their enjoyments thereof the more firm. Whereas a rigorous change of the laws and religion of the people, would render them in a restless and unquiet condition, and ready to lay hold of any opportunity, of defection or rebellion, to regain their ancient laws and religion, which ordinary people count most dear to them. Though at this day, the indulgence of a Paganish religion is not used to be allowed by any Christian victor, as is observed in Calvin's case, in the Seventh Report. To give one instance for all, it was upon this account, that though the Romans had wholly subdued Syria and Palestina, yet they allowed to the inhabitants the use of their religion and laws, so far forth as consisted with the safety and security of the victor's interest. And therefore, though they reserved to themselves the cognizance of such causes as concerned themselves, their officers, or revenues;

revenues; and such cases as might otherwise disturb the security of their empire—as treasons, insurrections, and the like; yet it is evident, they indulged the people of the Jews, &c. to judge by their own law; not only of some criminal proceedings, but even of capital, in some cases; as appears by the history of the Gospels and Acts of the Apostles.

BUT still this was but an indulgence, and therefore was resumable by the victor; unless there intervened any capitulation between the conqueror and the conquered to the contrary, which was frequent; especially in those cases when it was not a compleat conquest, but rather a dedition upon terms and capitulations, agreed between the conqueror and the conquered; wherein usually, the yielding party secured to themselves, by the articles of their dedition, the enjoyment of their laws and religion; then by the laws of nature and of nations, both which oblige to the observation of faith and promises, those terms and capitulations were to be observed. Again, secondly, when after a full conquest, the conquered people resumed so much courage and power as began to put them into a capacity of regaining their former laws and liberties; this commonly was the occasion of terms and capitulations between the conquerors and conquered. Again, thirdly, when by long succession of time, the conquered had either been incorporated with the conquering people, whereby they had worn out the very marks and discriminations between the conquerors and conquered; and if they continued distinct, yet by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled; and the long permission of the conquerors amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties.

BUT

BUT of this more than enough is said, because it will appear in what follows, that William I. never made any such conquest of England.

SECONDLY, therefore I come to the second kind of conquest, viz. that which is only *victoria in regem*. And this is where the conqueror either has a real right to the crown or chief government of a kingdom, or at least has, or makes some pretence or claim thereunto; and, in pursuance of such claim, raises war, and by his forces obtains what he so pretends a title to. Now this kind of conquest does only instate the victor in those rights of government, which the conquered prince, or that prince to whom the conqueror pretends a right of succession, had; whereby he becomes only a successor *jure belli*, but not a victor, or conqueror upon the people; and therefore has no more right of altering their laws, or taking away their liberties or possessions, than the conquered prince; or the prince to whom he pretends a right of succession, had. For the intention, scope, and effect of his victory extends no further than the succession, and does not at all affect the rights of the people. The conqueror is, as it were, the plaintiff; the conquered prince is the defendant; and the claim is, a claim of title to the crown. And because each of them pretends a right to the sovereignty, and there is no other competent trial of the title between them, they put themselves upon the great trial by battle (*g*); wherein there is nothing in question touching the rights of the people, but only touching the right of the crown; and that being decided by the victory, the victor comes in as a successor, and not *jure victoria*, as in relation to the people's rights; the most sacred whereof are their laws and religion.

(*g*) Vide cap. 6. note (*b*),

INDEED,



INDEED, those that do voluntarily assist the conquered prince, commonly undergo the same hazard with him, and do, as it were, put their interest upon the hazard and issue of the same trial; and therefore commonly fall under the same severity with the conquered, at least *de facto*; because, perchance, the victor thinks he cannot be secure without it. Yet usage, and indeed common prudence, makes the conquerors use great moderation and discrimination, in relation to the assistants of the conquered prince; and to extend this severity only to the eminent and busy assistants of the conquered; and not to the *gregarii*, or such as either by constraint, or by necessity, were enforced to serve against him. And as to those also, on whom they exercise their power, it has been rarely done *jure belli aut victoriae*, but by a judiciary proceeding, as in cases of treason; because now the great title by battle has pronounced for the right of the conqueror; and at best, no man must dare to say otherwise now, whatsoever debility was in his pretension or claim. We shall see the instances hereof in what follows.

THIRDLY, as to the third point, how the laws of England stood at the entry of king William I. It seems plain, that at the time of his entry into England, the laws commonly called the laws of Edward the Confessor, were then the standing laws of the kingdom (*b*). Hoveden tells us, in a digression under his History of King Henry II. that those laws were originally put together by king Edgar, who was the Confessor's grandfather, viz.

“ VERUM tamen post mortem ipsius regis Edgari usq;  
 “ ad coronationem sancti regis Edvardi quod tempus continet  
 “ sexaginta & septem annos prece (vel pretio) leges sopitæ

(*b*) Ante cap. i.

“ sunt & jus prætermiffæ fed poftquam rex Edvardus in  
 “ regno fuit fublimatus concilio baronum Angliæ legem  
 “ annos fexaginta & feptem fopitam, excitavit & confirma-  
 “ vit, & ea lex fic confirmata vocata eft lex fancti Edvardi,  
 “ non quod ipfe prius inveniffet eam fed cum prætermiffa  
 “ fuiffet & obligationi penitus dedita a morte avi fui regis Ed-  
 “ gari qui primus inventor ejus fuiffe dicitur ufque ad fua  
 “ tempora, viz. fexaginta & feptem annos.” And the fame  
 paffage, in *totidem verbis*, is in the Hiftory of Litchfield, cited  
 in Sir Robert Twiffden’s Prologue to the Laws of King Wil-  
 liam I. But although poffibly, thofe laws were collected by  
 king Edgar, yet it is evident, by what is before faid, they  
 were augmented by the Confeflor, by that extract of laws  
 before-mentioned; which he made out of that three-fold  
 law that obtained in feveral parts of England, viz. the  
 Danifh, the Mercian, and the Weft-Saxon laws.

THIS manual, as I may call it, of laws, ftiled the Con-  
 feflor’s Laws, was but a fmall volume, and contains but few  
 heads; being rather a fcheme, or directory, touching fome  
 method to be obferved in the diftribution of juftice, and fome  
 particular proceedings relative thereunto; efpecially in  
 matters of crime, as appears by the laws themfelves, which  
 are now printed in Mr. Lambard’s Saxon Laws, p. 133, and  
 other places. Yet the Englifh were very zealous for them,  
 no lefs or otherwife than they are at this time for the Great  
 Charter; infomuch that they were never fatisfied till the  
 faid laws were reinforced and mingled, for the moft part,  
 with the coronation oath of king William I. and fome of  
 his fucceffors.

AND this may ferve fhortly touching this third point;  
 whereby we fee that the laws that obtained at the time of  
 the

the entry of king William I. were the English laws, and principally those of Edward the Confessor.

FOURTHLY, the fourth particular is, the pretensions of king William I. to the crown of England, and what kind of conquest he made. This will be best rendered and understood, by producing the history of that business, as it is delivered over to us by the ancient historians that lived in or near that time. The sum, or *totum* whereof is this.

KING EDWARD the Confessor, having no children, not like to have any, had three persons related to him, whom he principally favoured, viz. First,

EDGAR ÆTHELING, the son of Edward, the son of Edmond Ironside. MATT. PARIS, anno 1066. "Edmundus autem Latus Ferreum rex naturalis de stirpe regum genuit Edwardum & Edwardus genuit Edgarum cui de jure debatur regnum Anglorum."

SECONDLY, Harold, the son of Goodwin earl of Kent, the Confessor's father-in-law; he having married earl Goodwin's daughter. And Thirdly,

WILLIAM duke of Normandy; who was allied to the Confessor thus, viz. William was the son of Robert (i), the

(i) William duke of Normandy, surnamed the Bastard, was the son of Robert the second, by Harlotta, the daughter of a tanner in Falaise. Brompton, 910. Our ancient historians differ about the name of William's mother. Abbot Brompton calls her Arlet, and so does the ancient chronicle of Normandy. Knyghton nominates her Arlee; others call her Herleva; which last may probably be right; most of the French writers, especially the moderns, calling her Herleva. Writers are better agreed as to her family; for they say, in general, that she was a tanner's daughter.

the son of Richard duke of Normandy, which Richard was brother unto the Confessor's mother. Vide Hoveden, sub initio anni primi Willielmi primi.

THERE was likewise a great familiarity, as well as this alliance, between the Confessor and duke William; for the Confessor had often made considerable residences in Normandy; and this gave a fair expectation to duke William of succeeding him in this kingdom. And there was also, at least, pretended, a promise made him by the Confessor, that duke William should succeed him in the crown of England [B]. And because Harold was in great favour with the king,

daughter. A French author, however, of great integrity, reports the matter differently in all respects. He says her name was Helena, and that she was not the daughter of a tanner, but of one Foubert, valet-de-chambre to the Duke of Normandy, which Foubert was the son of a tanner. *Recueil des Rangs des Grands de France*, par. 1. du Tillet, p. 137. William was so little ashamed of his birth, that he assumed the

appellation of Bastard, in some of his letters and charters. *Spelman Gloss. in verb. bastardus.* Camden in *Richmondshire*. Notwithstanding his illegitimacy, and the meanness of his mother, he had been allowed to succeed in the dutchy, to his father, though not without a very dangerous and factious opposition; which he had the good fortune to subdue, by the prudent care of his guardians and his own ability.

[B] Though the inveterate prepossessions of Edward kept him from seconding the pretensions of Harold, yet he took but feeble and irresolute steps for securing the succession to the Duke of Normandy. The whole story of the transactions between Edward, Harold, and the duke of Normandy is told so differently by the ancient writers, that there are few important passages of the English history liable to so great uncertainty. It does not seem likely, as some have supposed, that Edward ever executed a will in the duke's favour, much less that he got it ratified by the states of the kingdom, as is affirmed by others. The will would have been known to all, and would have been produced by the Conqueror, to whom it gave so plausible a title; but the doubtful and ambiguous manner in which he seems always to have mentioned it,



king, and of great power in England, and therefore the likeliest man by his assistance to advance, or by his opposition to hinder, or temperate, the duke's expectation; there was a contract made between the duke and Harold in Normandy, in the Confessor's life-time, that Harold should, after the Confessor's death, assist the duke in obtaining the crown of England (*k*). Shortly after which the Confessor died, and then stepped up the three competitors to the crown, viz.

it, proves, that he could only plead the known intentions of that monarch in his favour, which he was desirous to call a will. There is indeed a charter of the Conqueror, preserved by Dr. Hicks, (vol. 1.) where he calls himself *rex hereditarius*, meaning heir by will; but a prince possessed of so much power, and attended with so much success, may employ what pretences he pleases. It is sufficient to refute his pretences to observe, that there is a great diffidence and variation among the historians with regard to a point, which, had it been real, must have been agreed upon by all of them.

As to the circumstance of Harold's contract with the duke, in Normandy, some historians, particularly Malmesbury and Matthew Westminster, affirm that Harold had no intention of going over to Normandy, but that taking the air in a pleasure-boat on the coast, he was driven over, by stress of weather, to the territories of Guy, Count of Ponthieu: but besides that this story is not probable in itself, and is contradicted by most of the ancient historians, it is refuted by a very curious and authentic monument. It is a tapestry preserved in the ducal palace of Rouen, and supposed to have been wrought by orders of Matilda, wife to the Emperor: at least, it is of very great antiquity. Harold is there represented as taking his departure from king Edward in execution of some commission, and mounting his vessel with a great train. The design of redeeming his brother and nephew, who were hostages, is the most likely cause that can be assigned; and is accordingly mentioned by Eadmer, Hoveden, Brompton, and Simeon of Durham. For a farther account of this piece of tapestry, see *Histoire de l'Academie de Literature*, tom. ix. p. 535. HUME.

(*k*) W. Malm'sb. 93. Hoveden, 366. Ingulf. 68. Wace, 459, den, 449. Brompton, 947. Gul. 460. MS. penes Carte, 954. Gemet. l. 7. c. 31. H. Hunt.

1. EDGAR

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1. EDGAR ÆTHELING, who was indeed favoured by the nobility, but being an infant was overborn by the power of Harold, who thereupon began to set up for himself. Whereupon Edgar, with his two sisters, fled into Scotland; where he, and one of his sisters, dying without issue, Margaret, his other sister and heir, married Malcolm, king of Scots; from whence proceeded the race of the Scottish kings (o).

2. HAROLD, who having at first raised a power under pretence of supporting and preserving duke William's title to this kingdom, and having by force suppressed Edgar, he thereupon claimed the crown to himself. And pretending an adoption, or bequest of the kingdom unto him by the Confessor, he forgot his promise made to duke William, and usurped the crown; which he held but the space of nine months and four days. HOVEDEN [C].

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M

3. WIL-

(o) Though Edward had, with great affection, brought up Edgar, and had also bestowed on him the title of Ætheling, a title which, I believe, exclusively belonged to the royal family, and seemed to mark him out as heir to the crown; yet he was not afterwards, perhaps, (as Hale supposes) *overborn by the power of Harold*. On the contrary, notwithstanding this appearance of an adoption, as he was still under age when Edward died, he was not

thought capable of taking the government, and therefore was not nominated by that monarch at his decease, to succeed to the kingdom. And the same objection prevailed with the great council, or Witenagemote, to set him aside, and elect Harold. The excluding a minor from the succession in England, was not new to the Saxons. *Ld. Lyr. Hist. Hen. II. i v. 3. 4. 349. 350.* But see note [C] which follows below.

[C] Harold's accession was attended with as little opposition as if he had succeeded by the most unquestionable title. The citizens of London, the bishops and clergy, had adopted his cause; and all the most powerful nobility, connected with him by alliance or by friendship, willingly seconded his pretensions. The title of Edgar Ætheling was scarce ever mentioned; much less the claim of the duke of

Nor-

3. WILLIAM duke of Normandy, who pretended a promise of succession by the Confessor, and a capitulation or stipulation by Harold for his assistance; and had, it seems,

so

Normandy; and Harold, assembling the council, received the crown from their hands, without waiting for any regular meeting of the states, or submitting the question to their free choice or determination (*m*). The new prince, founding his title on the supposed suffrages of the people, which appeared unanimous, was, on the day immediately succeeding Edward's death, crowned and anointed king, by Aldred, archbishop of York. The whole nation seemed joyfully to swear allegiance to him.

The duke of Normandy, when he first received intelligence of Harold's accession, was moved to the highest pitch of indignation; but that he might give the better colour to his pretensions, he sent over an embassy to England, upbraiding Harold, with his breach of faith, and summoning him to resign immediately possession of the kingdom. Harold replied, that the oath with which he was reproached, had been extorted by the well-grounded fear of violence, and could never, for that reason, be regarded as obligatory: That he had no commission, either from the late king, or from the states of England, who alone could dispose of the crown, to make any tender of the succession to the duke of Normandy; and if he, a private person, had assumed so much authority; and had even voluntarily sworn to support the duke's pretensions, the oath was unlawful, and it was his duty to seize the first opportunity of breaking it: That he had obtained the crown by the unanimous suffrages of the people; and should shew himself totally unworthy of their favour, did he not strenuously maintain those national liberties, with which they had entrusted him: and that the duke, if he made any attempt by force of arms, should experience the power of an united nation, conducted by a prince, who, sensible of the obligations imposed on him by his royal dignity, was determined, that the same moment should put a period to his life and to his government (*n*). HUME.

(*m*) G. Piët. 196. Ypod. Neust. 436. Order. Vitalis, 492. M. West. 221. W. Malm. 93. Ingulf. 68. Brompton 957. Knyghton 2339. H. Hunting. 210. Many of the historians say, that Harold was re-

gularly elected by the states; some, that Edward left him his successor by will.

(*n*) W. Malm. 99. Higden 285. M. West. 222. De Gest. Angl. incerto auctore 331.

[D] The

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to far interested the pope in favour of his pretensions, that he pronounced for William against both the others [D].

HEREUPON the duke makes his claim to the crown of England; gathered a powerful army, and came over; and upon the 14th of October, Anno 1067 (q), gave Harold

(q) There is, I believe, a 1067) landed at Pevensey, in mistake in the year, for it seems Suffex. *Ld. Lyt. Hist. Hen. II.* agreed that William, on the day 1 v. oct. 25, of St. Michael, 1066 (and not

[D] The most important ally, whom William gained by negotiation, was the Pope, who had a powerful influence over the ancient barons, no less devout in their religious principles, than valorous in their military enterprizes. The Roman pontiff, after an insensible progress during several ages of darkness and ignorance, began now to lift his head openly above all the Princes of Europe; to assume the office of a mediator, or even an arbiter, in the quarrels of the greatest monarchs; to interpose himself in all secular affairs, and to obtrude his dictates, as sovereign laws, on his obsequious disciples. It was a sufficient motive to Alexander II. the reigning pope, for embracing William's quarrel, that he alone had made an appeal to his tribunal, and rendered him umpire of the dispute between him and Harold; but there were other advantages which that pontiff foresaw must result from the conquest of England by the Norman arms. That kingdom, though at first converted by Romish missionaries, though it had afterwards advanced some farther steps towards subjection under Rome, maintained still a great independence in its ecclesiastical administration; and forming a world within itself, entirely separated from the rest of Europe, it had hitherto proved inaccessible to those exorbitant claims, which supported the grandeur of the papacy. Alexander therefore hoped, that the French and Norman barons, if successful in their enterprize, might import into that country a more devoted reverence to the holy see, and bring the English churches to a nearer conformity with those of the rest of Europe. He declared immediately in favour of William's claim (o); pronounced Harold a perjured usurper; denounced excommunication against him and his adherents; and the more to encourage the duke of Normandy in his enterprize, he sent him a consecrated banner, and a ring with one of St. Peter's hairs in it (p). Thus (adds Mr. Hume) were all the ambition and violence of that invasion covered over safely with the broad mantle of religion.

(o) W. Malm. 100. Ingulf. 69. (p) Baker, 22. edit. 1684. Higden, 285. Brompton, 958.



battle, and overthrew him at that place in Suffex where William afterwards founded Battel-abbey, in memory of that victory (r). And then he took upon him the government of the kingdom, as king thereof; and upon Christmas following was solemnly crowned at Westminster by the archbishop of York (s). And he declared at his coronation, that he claimed the crown, not *jure belli*, but *jure successionis*. Brompton gives us this account thereof, "cum nomen tyranni exhorresceret & nomen legitimi principis induere vellet petiit consecrari;" and accordingly, says the same author, the archbishop of York, in respect of some present incapacity in the archbishop of Canterbury, "minus hoc adimplevit ipsumque Gulielmum Regem ad jura Ecclesiæ Anglicanæ tuenda & conservanda populumque suum recte regendum, & Leges rectas statuendum facramento solemniter adstrinxit;" (t) and thereupon he took the homage of the nobility (u).

(r) Gul. Gemet. 288. Chron. Sax. 189. M. West. 226. M. Paris, 9. Diceto, 482. This convent was freed by him from all episcopal jurisdiction. Monast. Ang. tom. 1. p. 311, 312.

(s) William pretending that Stigand, the primate, had obtained his pall in an irregular manner from pope Benedict IX. who was himself an usurper, refused to be consecrated by him; and therefore conferred that honour on Aldred, archbishop of York. Gul. Pistav. 206. Ingulf. 69. Malmesb. 102. Hoveden, 450. M. West. 245. Flor. Wig. 635. M. Paris, 4. Anglia Sacra, vol. 1. p. 248. Alur. Bever. 127. Stigand was possessed of such

influence and authority over the English, as might be dangerous to a new established monarch. Eadmer. 6. See Biog. Brit. 1 v. 128. tit. Aldred, ed. 1778. Ld. Lyt. Hist. Hen. II. 1 v. oct. 40.

(t) Order. Vital. 503. Malmesb. 271.

(u) The King, thus possessed of the throne by a pretended destination of king Edward, and by an irregular election of the people, but still more by the power of his arms, retired from London to Barking in Essex; and there received the submissions of all the nobility who had not attended his coronation. Gul. Pistav. 208. Order. Vitalis, 503.

THIS being the true, though short account of the state of that business, there necessarily follows from thence these plain and unquestionable consequences.

FIRST, that the conquest of king William I. was not a conquest upon the country, or people, but only upon the king of it, in the person of Harold, the usurper. For William I. came in upon a pretence of title of succession to the Confessor; and the prosecution and success of the battle he gave to Harold, was to make good his claim of succession, and to remove Harold, as an unlawful usurper, upon his right. Which right was now decided in his favour, and determined by that great trial, by battle (x).

SECONDLY, that he acquired in consequence thereof no greater right than what was in the Confessor, to whom he pretended a right of succession; and therefore, could no more alter the laws of the kingdom upon the pretence of conquest, than the Confessor himself might; or than the duke himself could have done, had he been the true and rightful successor to the crown, in point of descent from the Confessor. Neither is it material, whether his pretence were true or false; or whether, if true, it were available or not, to entitle him to the crown. For whatsoever it was, it was sufficient to direct his claim, and to qualify his victory so, that the *jus belli* thereby acquired, could be only *victoria in regem, sed non in populum*: and put him only in the state, capacity and qualification of a successor to the king, and not as conqueror of the kingdom (y).

(x) Seld. of Tithes, c. 8. Blac. Com. 1 v. 199.

(y) Though Sir Matthew Hale, and others, contend that the conquest by William can be considered in no other light than an acquisition, without any of

the powers attendant on subjugation, yet others, particularly Wilkins and Dr. Brady, understand it to have been no less than an absolute conquest. See note [E] on this chapter.

THIRDLY, and as this his antecedent claim kept his conquest within the bounds of a successor, and restrained him from the unlimited bounds and power of a conqueror; so his subsequent coronation, and the oath by him taken, is a further unquestionable demonstration, that he was restrained within the bounds of a successor, and not enlarged with the latitude of a victor. For at his coronation, he bound himself by a solemn oath to preserve the rights of the church, and to govern according to the laws; and not absolutely and unlimitedly, according to the will of a conqueror.

FOURTHLY, that if there were any doubt whether there might be such a victory as might give a pretension to him of altering laws, or governing as a conqueror; yet to secure from that possible fear, and to avoid it, he ends his victory in a capitulation. Namely, he takes the ancient oath of a king unto the people; and the people reciprocally giving or returning him that assurance that subjects ought to give, their prince, by performing their homage to him as their king, declared him, by the victory he had obtained over the usurper, to be the successor of the Confessor (z). Consequently, if there might be any pretence of conquest over the people's rights, as well as over Harold's, yet the capitulation, or stipulation, removes the claim or pretence of a conqueror, and enstates him in the regulated capacity and state of a successor. And upon all this it is evident, that king William I. could not abrogate, or alter the ancient laws of the kingdom, any more than if he had succeeded the Confessor as his lawful heir, and had acquired the crown by the peaceable course of descent, without any sword drawn. [E]

AND

(z) See *Ld. Lyt. Hist. Hen. Brit.* 1 v. 128. ed. 1778. tit. AL-  
II. 1 v. oct. 40. and the au- dred.  
thorities there cited. Also *Biog.*

[E] Some have been desirous of refusing to William the title of conqueror, in the sense in which it is commonly understood; and  
on

AND thus much may suffice, to shew that king William I. did not enter by such a right of conquest, as did or could alter the laws of this kingdom,

M 4

THERE-

on pretence that the word is sometimes in old books applied to such as make an acquisition of territory by any means, they are willing to reject William's title by right of war to the crown of England. It is needless to enter into a controversy, which by the terms of it must necessarily degenerate into a dispute of words. It suffices to say, that the Duke of Normandy's first invasion of the island was hostile; that his subsequent administration was entirely supported by arms; that in the very frame of his laws, he made a distinction between the Normans and English, to the advantage of the former (a); that he acted in every thing as absolute master over the natives, whose interests and affections he totally disregarded; and that if there was an interval when he assumed the appearance of a legal magistrate, the period was very short, and was nothing but a temporary sacrifice, which he, as has been the case with most conquerors, was obliged to make of his inclination to his present policy. Scarce any of those revolutions which both in history and in common language have always been denominated conquests, appear equally violent, or have been attended with so sudden an alteration, both of power and property. The Roman state, which spread its dominion over Europe, left the rights of individuals in a great measure untouched; and those civilized conquerors, while they made their own country the seat of empire, found, that they could draw most advantage from the subject provinces, by bestowing on the natives the free enjoyment of their own laws, and of their private possessions. The barbarians who subdued the Roman empire, though they settled in the conquered countries, yet being accustomed to a rude, uncultivated life, found a small part of the land sufficient to supply all their wants; and they were not tempted to seize extensive possessions, which they neither knew how to cultivate nor employ. But the Normans and other foreigners who followed the standard of William, while they made the vanquished kingdom the seat of empire, were yet so far advanced in arts as to be acquainted with the advantages of a large property; and having totally subdued the natives, they pushed the rights of conquest (very extensive in the eyes of avarice and ambition, however narrow in those of reason) to the utmost extremity against them. Except the former conquest of England by the Saxons themselves, who were induced by peculiar circumstances to proceed even

(a) Hoveden, p. 600.



THEREFORE I come to the last question I proposed to be considered, viz. Whether *de facto* there was any thing done by

to the extermination of the natives, it would be difficult to find in all history a revolution more destructive, or attended with a more complete subjection of the ancient inhabitants. Contumely seems even to have been wantonly added to oppression (*b*); and the natives were universally reduced to such a state of meanness and poverty, that the English name became a term of reproach; and several generations elapsed before one family of Saxon pedigree was raised to any considerable honours, or could so much as attain the rank of barons of the realm (*c*). These facts are, so apparent from the whole tenor of the English history, that none would have been tempted to deny or elude them, were they not heated by the controversies of faction; while one party were absurdly afraid of these absurd consequences, which they saw the other party inclined to draw from this event. But it is evident, that the present rights and privileges of the people, who are a mixture of English and Normans, can never be affected by a transaction which passed more than seven hundred years ago; and as all ancient authors (*d*), who lived nearest

(*b*) H. Hunt. p. 370. Brompton, p. 980.

(*c*) So late as the reign of king Stephen, the earl of Albemarle, before the battle of the standard, addressed the officers of the army in these terms: *Proceres Angliæ clarissimi, et genere Normanni*, &c. Brompton, p. 1026. See farther Abbas Rieval. p. 339, &c. All the barons and military men of England still called themselves Normans.

(*d*) Ingulf. p. 70. H. Hunt. p. 370, 372. M. Weir. p. 225. Gul. Neub. p. 357. Alured. Beverl. p. 124. De gest. Angl. p. 333. M. Paris, p. 4. Sim. Dun. p. 206. Brompton, p. 962. 980, 1161. Gervase Tilb. lib. 7. cap. 16. Textus Rossensis apud Seid. Spicileg. ad Eadm. p. 197.

Gul. Piët. p. 206. Ordericus Vitalis, p. 521. 666. 853. Epist. St. Thom. p. 801. Gul. Malmesb. p. 52, 57. Knyghton, p. 2354. Eadmer. p. 110. Thom. Rudborne in Ang. Sacra, vol. I. p. 248. Monach. Ross. in Anglia Sacra, vol. II. p. 276. Girald. Cambr. in eadem, vol. II. p. 413. Hist. Elyensis, p. 516. The words of this last historian, who is very ancient, are remarkable, and worth transcribing. "Rex itaque factus Willielmus, quid in principem Anglorum, qui tantæ cladi superesse poterant, fecerit, dicere, cum nihil prossi, omitto. Quid enim prodesset, si nec unum in toto regno de illis dicerem pristine potestate uti permissum, sed omnes aut in gravem paupertatis ærumnam detruos aut ex hereditatis patria pulsos, aut effossos

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by king William I. after his acceſſion to the crown, in reference either to the alteration or confirmation of the laws ; and how and in what manner the ſame was done.

THIS, being a narrative of matters of fact, I ſhall divide into two inquiries ; viz. firſt, What was done in relation to the lands and poſſeſſions of the Engliſh ; and ſecondly, What was done in relation to the laws of the kingdom in general. For both of theſe will be neceſſary to make up a clear narrative touching the alteration or ſuſpenſion, confirmation or execution, of the laws of this kingdom by him.

FIRST, therefore, touching the former, viz. What was done in relation to the lands and poſſeſſions of the Engliſh,

THESE two things muſt be premiſed, viz. Firſt, a matter of right, or law ; which is this, that in caſe this had been a conqueſt upon the kingdom, it had been at the pleaſure of the conqueror to have taken all the lands of the kingdom into his own poſſeſſion ;—to have put a period to all former titles ;—to have cancelled all former grants ;—and to have given, as it were, the date and original to every man's claim, ſo as to have been no higher nor ancients than ſuch his conqueſt, and to hold the ſame by a title derived wholly from and under him. I do not ſay, that every abſo-

neareſt the time, and beſt knew the ſtate of the country, unani- mouſly ſpeak of the Norman dominion as a conqueſt by war and arms, no reaſonable man, from the fear of imaginary conſequences, will ever be tempted to reject their concurring and undoubted teſti- mony. HUME.

effoſis oculis, vel cæteris amputatis membris, opprobrium hominum factos, aut certe miſerime afflictoſ, vita privatos. Simili modo utilitate cære exiſtimo dicere quid in mino-

rem populum, non ſolum ab eo, ſed a ſuis actum ſit, cum id dictu ſciamus difficile, et ob immanem crudelitatem fortassis incredibile.

lute

lute conqueror of a kingdom will do thus ; but that he may, if he will, and has power to effect it. Secondly, the second thing to be premised is, a matter of fact, which is this ; That duke William brought in with him a great army of foreigners, that expected a reward of their undertaking ; and therefore were doubtless very craving and importunate for gratifications to be made them by the conqueror (*e*). Again, it is very probable, that of the English themselves, there were persons of very various conditions and inclinations ; some perchance did adhere to the duke, and were assistant to him openly, or at least under-hand, towards the bringing him in ; and those were sure to enjoy their possessions privately and quietly when the duke prevailed. Again, some did, without all question, adhere to Harold ; and those in all probability were severely dealt with, and dispossessed of their lands, unless they could make their peace. Again, possibly there were others who assisted Harold ; partly out of fear and compulsion ; yet those, possibly, if they were of any note or eminence, fared little better than the rest. Again, there were some that probably stood neuter, and meddled not ; and those, though they could not expect much favour, yet they might in justice expect to enjoy their own. Again, it must needs be supposed, that the duke having so great an army of foreigners ;—so many ambitious and covetous minds to be satisfied ;—so many to be rewarded in point of gratitude ; and after so great a concussion as always happens upon the event of a victory, it must needs, upon those and such like accounts, be evident to any man that considers things

(*e*) William bestowed the forfeited estates on the most powerful of his captains, and established funds for the payment of his soldiers. Gul. Pi&t. 208.—His military institutions were those

of a tyrant ; at least of one, who reserved to himself, whenever he pleased, the power of assuming that character. H. Hunt. 369. M. West. 225. Malmfb. 104.

of this nature, that there were great outrages and oppressions committed by the victor's soldiers and their officers ;— many false accusations made against innocent persons ;— great disturbances and evictions of possessions ;— many right owners being unjustly thrown out, and consequently many occupations and usurpations of other men's rights and possessions ;— and a long while before those things could be reduced to any quiet and regular settlement [F].

THESE

[F] Though the early confiscation of Harold's followers might seem iniquitous, being extended towards men who had never sworn fidelity to the duke of Normandy ; who were ignorant of his pretensions, and who only fought in defence of the government, which they themselves had established in their own country ; yet were these rigours, however contrary to the ancient Saxon laws, excused on account of the urgent necessities of the prince. The successive destruction of families was a convincing proof that the king intended to rely entirely on the support and affections of foreigners ; and new forfeitures, attainders, and violences were the necessary result of this destructive plan of administration. No Englishman possessed his confidence, or was intrusted with any command or authority ; and strangers, whom a rigorous discipline could have but ill contained, were encouraged in every act of insolence and tyranny against them. The easy submission of the kingdom on its first invasion, had exposed the natives to contempt ; the subsequent proofs of their animosity and resentment had made them the object of hatred ; and they were soon deprived of every expedient by which they could hope to make themselves either regarded or beloved by their sovereign. Impressed with the sense of this dismal situation, many Englishmen fled into foreign countries, with an intention of passing their lives abroad free from oppression, or of returning on a favourable opportunity to assist their friends in the recovery of their native liberties (f). It was crime sufficient, in an Englishman, to be opulent, noble, or powerful ; and the policy of the king concurring with the rapacity of his foreign adventurers, produced almost a total revolution in the landed property of the kingdom. Ancient and honourable families were reduced to beggary ; the nobles themselves were every where treated with ignominy and

(f) Order. Vital. 508. M. West. 225. M. Paris. 4. Sim. Dun. 197.

contempt ;



THESE general observations being premised, we will now see what *de facto* was done in relation to men's possessions, in consequence of this victory of the duke.

FIRST, it is certain that he took into his hands all the demesne lands of the crown which were belonging to Edward the Confessor at the time of his death; and avoided all the dispositions and grants thereof made by Harold, during his short reign. And this might be one great end of his making that noble survey, in the fourth year of his reign, called generally, Doomsday-read, in some records; as Rot. Winton, &c.—thereby to ascertain what were the possessions of the crown in the time of the Confessor. And those he entirely resumed. And this is the reason why in some of our old books it is said, ANCIENT DEMESNE is that which was held by king William the Conqueror; and in others 'tis said, ancient demesne is that which was held by king Edward the Confessor. And both true in their kind, in this respect; viz. that whatsoever appeared to be the Confessor's at the time of his death, was assumed by king William into his own possession [G].

#### SECONDLY,

contempt; they had the mortification of seeing their castles and manors possessed by Normans of the meanest birth, and of the lowest stations (g), and they found themselves carefully excluded from every road, which led either to riches or preferment (b).  
HUME.

[G] Those lands which were in the possession of Edward the Confessor, and which afterwards came to William the Conqueror,

(g) Order. Vitalis, 521. M. as a mark of the servitude of the English. But this was a law of police, which William had previously established in Normandy. See Du

(b) The obliging all the inhabitants to put out their fires and lights at certain hours, upon the founding of a bell, called the courfeu, is represented by Polydore Virgil, lib. 9, Le Burgor, cap. 86.

and

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SECONDLY, it is also certain, that no person simply, and *quatenus* an English man, was dispossessed of any of his possessions;

and were by him set down in a book called DOMESDAY, under the title *De Terra Regis*, are ANCIENT DEMESNE LANDS. They were exempt from any *feudal* servitude, and were let out to husbandmen to cultivate for the purpose of supplying the king's household and family with provisions and necessities. For this purpose the tenants (who are called by Bracton, *villani privilegiati*) enjoyed certain privileges, and the tenure itself had several properties distinct from others, which it retains to this day; though the lands be in the hands of a subject, and the services changed from labour to money. 2 Inst. 342. 4 Inst. 269. F. N. B. 14. Salk. 57. pl. 2. Black. Com. 2 v. 99. But the lands which were in the possession of Edward the Confessor, and which were given away by him, are NOT at this day ancient demesne; nor are any others, except those which are written down in the book of DOMESDAY; and therefore, whether such lands are ancient demesne or not, is to be tried only by that book. Salk. 57. 4 Inst. 269. Hob. 183. Brownl. 43. The book of DOMESDAY was brought into court by a certiorari out of chancery, directed to the treasurer and chamberlain of the exchequer, and by mittimus sent into the common pleas. Dy. 150. b. Issue was taken "whether Longhope in the county of Gloucester was ancient demesne or not;" on producing the book of DOMESDAY, it appeared that Hope was ancient demesne, but nothing said of Longhope; and the Court held, that the party failed in his proof. Lev. 106. Sid. 147. But if the question be, "whether lands be parcel of a manor which is ancient demesne?" this shall be tried by a jury. Salk. 56. pl. 1. 2 Salk. 174. But see Burr. 1048. where an acre of land may be ancient demesne, though the manor, of which it is parcel, is not so. Vide Rol. Abr. 321. and see F. N. B. 14. Leon. 232. Dyer 8. 11 Co. 10. Bro. Ancient Dem. 15. 2 Leon. 191. 3 Lev. 405. Lands which are next, or most convenient to the lord's mansion-house, and which he keeps in his own hands, for the support of his family, and for hospitality, are called his demesnes, but have not the same properties with ancient demesne. Spelm. 12. Blackstone, in treating of the rents and profits of the demesne lands of the crown, as being a branch of the king's ordinary revenue, says, "These demesne lands, *terre dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprizing divers manors,

possessions; consequently their land was not pretended unto, as acquired *jure belli*. Which appears most plainly by the following evidences, viz.

## FIRST,

manors, honours and lordships; the tenants of which had very peculiar privileges. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after king William III. had greatly impoverished the crown, an act passed, (1 Ann st. 1. c. 7.) whereby all future grants or leases from the crown, for any longer term than thirty-one years, or three lives, are declared to be void; except with regard to houses, which may be granted for fifty years. And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives, or thirty-one years: that is, where there is a subsisting lease of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value. The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; but may be of benefit to posterity, when those leases expire." Black. Com. 1 v. 286. As to the tenure, lord Holt, said it was as ancient as any other, though he supposes that the privileges annexed to it, commenced by some act of parliament; for that it cannot be created by grant at this day. Salk. 57. Mr. Justice Blackstone, in treating of this tenure, describes it thus: "There is a species of tenure described by Bracton under the name sometimes of privileged villenage, and sometimes of villein socage. This he tells us, l. 4. tr. 1. c. 28, is such as has been held of the kings of England from the Conquest downwards; that the tenants herein *villana faciunt servitia, sed certa et determinata*; that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes, is no other than an exalted species of copyhold, subsisting at this day, viz. the tenure in ancient demesne; to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty,

he

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FIRST, that very many of those persons that were possessed of lands in the time of Edward the Confessor, and so returned

he has therefore given a name compounded out of both, and calls it VILLANUM SOCAGIUM. The tenants of ancient demesne lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies, c. 66. continued for a long time pure and absolute villeins, dependent on the will of the lord; and those who have succeeded them in their tenures, now differ from common copyholders in only a few points. F. N. B. 228. Others were in great measure enfranchised by the royal favour, being only bound in respect of their lands to perform some of the better sort of villein services, but those DETERMINATE and CERTAIN; as, to plough the king's land, to supply his court with provisions, and the like; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them; 4 Inst. 269.; as, To try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated, a writ of right close; F. N. B. 11. Not to pay toll or taxes; not to contribute to the expences of knights of the shire; not to be put on juries, and the like. See 1 New Abr. 111. These tenants therefore, though their tenure be absolutely copyhold, yet have an interest equivalent to a freehold: for, though their services were of a base and villenous original, (Gilb. Hist. Exch. 16. 30.) yet the tenants were esteemed, in all other respects, to be highly privileged villeins; and especially in this, THAT THEIR SERVICES WERE FIXED AND DETERMINATE, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*, says Bracton, *dicuntur liberi*." Britton also, from such their freedom, calls them absolutely SOKEMANS, and their tenure SOKEMANRIES; which he describes (c. 66.) to be lands and tenements which are not held by knight-service, nor by grand serjeanty, nor by petit, but by simple services, being as it were lands enfranchised by the king or his predecessors from their ancient demesne. And the same name is also given them in Fleta, l. 1. c. 8. Hence Fitzherbert observes, (N. B. 13.) that no lands are ancient demesne but lands holden in socage: that is, not in free and common socage, but in this amphibious, subordinate class, of villein socage. And it is possible, that as this species of socage tenure is plainly founded upon *predial* services, or services of the plough, it may have given cause to imagine that all socage tenures arose from the same original; for want of distinguishing, with Bracton, between free socage or

socage



returned upon the book of Doomsday, retained the same unto them and their descendants; and some of their descendants retain the same possessions to this day; which could not have been, if presently, *jure belli ac victoriæ universalis*, the lands of the English had been vested in the conqueror. And again,

SECONDLY, we do find, that in all times, even suddenly after the conquest, the charters of the ancient Saxon kings WERE PLEADED AND ALLOWED; and titles made and created by them, to lands, liberties, franchises, and regalities, affirmed and adjudged under William I. Yea, when that exception was offered, THAT BY THE CONQUEST THOSE CHARTERS HAD LOST THEIR FORCE, yet those claims were allowed. As in 7 E. 3. *finet*, mentioned by Mr. Selden, in his notes upon Eadmerus; which could not be, if there had been such a conquest as had vested all men's rights in the conqueror.

THIRDLY, many recoveries were had shortly after this conquest, as well by heirs as successors, of the seisin of their predecessors before the conquest. We shall take one or

soilage of frank tenure, and villein soilage or soilage of ancient demesne.—Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of 12 Cha. 2. c. 24. Yet they differ from common copyholds, principally in the privileges beforementioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day, viz. that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the rest; but must pass by surrender, to the lord or his steward, in the manner of common copyholds: yet with this difference, (Kitch. on Courts 194.) that, in the surrender of these lands in ancient demesne, it is not used to say, "to hold at the will of the lord," in their copies, but only "to hold according to the custom of the manor." Black. Com. 2 v. 101. How ancient demesne may become frank-fee, and where it may be pleaded, and the form, vide 1 New Abr. 112, 113, and the authorities there cited.

two instances for all; namely, that famous record *apud Pinenden*, by the archbishop of Canterbury, in the time of king William I. of the seisin and title of his predecessors before the conquest. See the whole process and proceedings thereupon, in the end of Mr. Selden's notes upon Eadmerus, and Spelman's Glossary, title *Drenches*. Upon these instances, and much more that might be added, it is without contradiction, that the rights and inheritances of the English, *quia tales*, were not abrogated or impeached by this conquest; but continued, notwithstanding, the same. For, as is before observed, it was *jure belli quoad regem, sed non quoad populum*.

BUT to descend to some particulars. The English persons that the Conqueror had to deal with were of three kinds, viz.

FIRST, such as adhered to him against Harold the usurper; and, without all question, those continued the possession of their lands; and their possessions were rather increased by him, than any way diminished.

SECONDLY, such as adhered to Harold, and opposed the duke, and fought against him; and doubtless, as to those, the duke after his victory used his power, and dispossessed them of their estates; which is usual upon all conclusions and events of this kind, upon a double reason: First, to secure himself against the power of those that opposed him, and to weaken them in their estates, that they should not afterwards be enabled to make head against him: and, secondly, to gratify those that assisted him, and to reward their services in that expedition; and to make them firm to his interest, which was now twisted with their own. For it

can't be imagined, but that the Conqueror was assisted with a great company of foreigners—some that he favoured—some that had highly deserved for their valour—some that were necessitous soldiers of fortune—and others that were either ambitious or covetous; all whose desires, deserts, or expectations, the Conqueror had no other means to satisfy, but by the estates of such as had appeared open enemies to him; and doubtless, many innocent persons suffered in this kind, under false suggestions and accusations; which occasioned great exclamations by the writers of those times against the violences and oppressions which were used after this victory.

AND, thirdly, such as stood neuter, and meddled not on either side during the controversy. And doubtless, for some time after this great change, many of those suffered very much, and were hardly used in their estates, especially such as were of the more eminent sort (*i*).

GERVASIUS TILBURIENSIS, who wrote in the time of Henry II. lib. 1. cap. *Quid Murdrum & Quare sic Dicitur*, gives us a large account of what he had traditionally learned touching this matter, to this effect, viz. “Post regni con-  
“quisitionem & perduellium subjectionem, &c. nomine  
“autem successionis a temporibus subactæ gentis nihil sibi  
“vendicarent, &c.” i. e. after the conquest of the king-  
dom, and subjection of the rebels, when the king himself  
and his great men had surveyed their new acquisitions,  
strict enquiry was made, who they were that, fighting  
against the king, had saved themselves by flight. From these,  
and the heirs of such as were slain in battle, fighting  
against him, all hopes of succession, or of possessing their

(*i*) Vide note [F] on this chapter.

estates,

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estates, were lost; for the people being subdued, they held their lives [*and fortunes*] as a favour.

BUT Gervase, as he speaks so liberally in relation to the conquest, and the *subacta gens*, as he terms us; so it should seem he was, in great measure, mistaken in this relation. For it is most plain, that those that were not visibly engaged in the assistance of Harold, were not, according to the rules of those times, disabled to enjoy their possessions, or make title of succession to their ancestors, or transmit to their posterity as formerly; though possibly some oppressions might be used to particular persons, here and there, to the contrary. And this appears by that excellent monument of antiquity, set down in sir H. Spelman's Glossary, in the title of *Drenches* or *Drenges*; which I shall here transcribe, viz.

“EDWINUS DE SHARBORNE, et quidam alii qui ejectione fuerunt & terris suis abierunt ad conquestorem & dixerunt ei, quod nunquam ante conquestum, nec in conquestum, nec post, fuerunt contra regem ipsum in CONCILIO AUT IN AUXILIO sed tenuerunt se in pace, et hoc parati sunt probare qualiter rex vellet ordinare, per quod idem rex facit inquiri per totam Angliam si ita fuit, quod quidem probatum fuit, propter quod idem rex præcepit ut omnes illi qui sic tenuerunt se in pace in forma prædicta quod ipsi REHABERENT omnes terras & dominationes suas adeo integre & in pace ut unquam habuerent vel tenuerunt ante conquestum suum, et quod ipsi in posterum vocarentur *Drenges*.”

BUT it seems the possessions of the Church were not under this discrimination, for they being held not in right of the person, but of the Church, were not subject to any confiscation



cation by the adherence of the possessor to Harold the usurper (*k*). And therefore, though it seems Stigand archbishop of Canterbury, at the coming in of William I. had been in some opposition against him, which probably might be the true cause why he performed not the office of his coronation, which of right belonged to him, though some other impediments were pretended (*l*), and might also possibly be the reason why a considerable part of his possessions were granted to Odo, bishop of Bayeux; yet they were afterwards recovered by Lanfranc, his successor, at Pinendon, "*in pleno comitatu, ubi rex præcepit totum comitatum absque mora considere, & homines comitatus omnes francigenos & præcipue Anglos in antiquis legibus & consuetudinibus peritos in unum convenire.*"

To this may be added those several grants and charters made by king William I. mentioned in the History of Ely, and in Eadmerus, for restoring to bishopricks and abbies such lands, or goods, as had been taken away from them, viz.

"WILLIELMUS Dei gratia rex Anglorum, Lanfranco archiepiscopo Cantuar' & Galfrido episcopo Constantien. & Roberto comiti de Ou & Richardo filio comitis Gilberti & Hugoni de Monteforti suisque aliis proceribus regni Angliæ salutem. Summonete vicecomites meos ex meo præcepto & ex parte mea eis dicite ut reddant episcopatibus meis & abbatibus totum dominium omnesque dominicas terras quas de dominio episcopatum meorum, & abbatarium, episcopi mei & abbates eis vel lenitate ti-

(*k*) William, however, retained the church in great subjection, as well as his lay subjects: and would allow none, of whatever character, to dispute his sovereign will and pleasure.

(*l*) The crimes alledged a-

gainst Stigand were mere pretences; his ruin was not only resolved on, but prosecuted with great severity. Hoveden, 453. Diceto, 482. Knyghton, 2345. Anglia Sacra, i v. 5, 6, Ypod. Neust. 438. Eadmerus in initio libri.

" more

"more vel cupiditate dederunt vel habere consenserunt vel  
 "ipsi violentia sua inde abstraxerunt, & quod hactenus  
 "injuste possiderunt de dominio ecclesiarum mearum. Et  
 "nisi reddiderint sicut eos ex parte mea summonebitis, vos  
 "ipsos velint nolint, constringite reddere; et quod si qui-  
 "libet alius vel aliquis vestrum quibus hanc justitiam im-  
 "posui ejusdem querelæ fuerit reddat similiter quod de  
 "domino episcopatum vel abbatiarum mearum habuit  
 "ne propter illud quod inde aliquis vestrum habebit, minus  
 "exerceat super meos vicecomites vel alios, quicumque te-  
 "neant dominium ecclesiarum mearum, quod præcipio, &c."

"WILLIELMUS rex Anglor' omnibus suis fidelibus suis &  
 "vicecomitibus in quorum vicecomitatibus abbatia de Heli  
 "terras habet salutem. Præcipio ut abbatia præd. habeat  
 "omnes consuetudines suas scilicet saccham & socham toll  
 "& team & infanganetheof, hamsocua, & grithbrice fith-  
 "wite & ferdwite infra burgum & extra & omnes alias  
 "forisfacturas in terra sua super suos homines sicut habuit  
 "die qua rex Edwardus fuit vivus & mortuus, & sicut  
 "mea jussione dirationatæ apud Keneteford per plures  
 "scyras ante meos barones, viz. Galfridum Constantien.  
 "ep. & Baldewine abbatem, &c. Teste Rogere Bigot."

"WILLIELMUS rex Angl. Lanfranco archiepo', & Rogero  
 "comiti Moritonæ, & Galfrido Constantien. ep. salutem.  
 "Mando vobis & præcipio ut iterum faciatis congregari  
 "omnes scyras quæ interfuerunt placito habito de terris  
 "ecclesia de Heli, antequam mea conjux in Normaniam  
 "novissime veniret, cum quibus etiam sint de baronibus  
 "meis qui competenter adesse poterint & prædicto placito  
 "interfuerint & qui terras ejusdem ecclesiæ tenent; quibus  
 "in unum congregatis eligantur plures de illis Anglis qui  
 "sciunt quomodo terræ jacebant præfatæ ecclesiæ die qua  
 "rex Edwardus obiit, & quod inde dixerint ibidem jure-

“jurando testentur; quo facto restituentur ecclesie terræ  
 “quæ in dominico suo erant die obitus regis Edwardi;  
 “exceptis his quas homines clamabant me sibi dedisse;  
 “illas vero literis mihi significate quæ sint, & qui eas te-  
 “nent; qui autem tenent thainlandes quæ proculdubio  
 “debent teneri de ecclesia faciant concordiam cum abbate  
 “quam meliorem poterint, & si noluerunt terræ remaneant  
 “ad ecclesiam, hoc quoque detinentibus socham & saccham  
 “fiat,” &c.

“WILLIELMUS rex Anglorum, Lanfranco archiepiscopo, &  
 “G. episcopo & R. comiti M. salutem, &c. Defendite ne  
 “Remigius episcopus novas consuetudines requirat infra in-  
 “sulam de Heli, nolo enim quod ibi habeat nisi illud quod  
 “anteceffor ejus habebat tempore regis Edwardi scilicet qua  
 “die ipse rex mortuus est. Et si Remig. episcopus inde placi-  
 “tare voluerit placitet inde sicut fecisset tempore regis Edw.  
 “& placitum istum sit in vestra præsentia; de custodia de Nor-  
 “guic. abbatem Simeonem quietum esse demittite; sed ibi  
 “munitionem suam conduci faciat & custodiri. Facite re-  
 “manere placitum de terris quas calumniantur Willielmus de  
 “Ou, & Radulphus filius Gualeranni, & Robertus Gernon;  
 “si inde placitare noluerint sicut inde placitassent tempore re-  
 “gis Edwardi, & sicut in eodem tempore abbatia consuetudines  
 “suas habebat, volo ut eas omnino faciatis habere sicut abbas  
 “per chartas suas & per testes suos eas de placitare poterit.”

I MIGHT add many more charters to the foregoing, and  
 more especially those famous charters in Spelman's Councils,  
 vol. ii. fol. 14. & 165. whereby it appears, that king Wil-  
 liam I.—“communi concilio, & concilio archiepiscoporum  
 “episcoporum & abbatum, & omnium principum & baro-  
 “num regni,”—instituted the courts for holding pleas of  
 ecclesiastic causes to be separate and distinct from those  
 courts

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courts that had jurisdiction of civil causes (m). *Sed de his plusquam satis.* [H].

AND

(m) Blac. Com. 4 v. 415. See 4 Inst. 239. Wilk. LL. Angl. Sax. also Seld. in Ead. p. 6. l. 24. 192. and Blac. Com. 3 v. 63.

[H] The county court in the Anglo-Saxon times, and even during some part of the reign of William I. was a court of great power and dignity, in which the bishop of the diocese sat with the earl, and on which all the abbots, priors, barons, knights, and freeholders of the county were obliged to attend. Here all the controversies arising in the county, the most important not excepted, were determined; though not always finally, because there lay an appeal from its decrees to a higher court. In a county court of Kent, held in the reign of William I. at Pinendine, and of which Hale makes mention (ante), there were present one archbishop, three bishops, the earl of the county, the vice-earl or sheriff, a great number of the king's barons, besides a still greater multitude of knights and freeholders, who in the course of three days adjudged several manors to belong to the archbishopric of Canterbury, which had been possessed for some time by Odo, bishop of Baieux, the king's uterine brother, and by other powerful barons. (n)

But the county courts did not continue long after the conquest in this state of power and splendour. For William I. about A. D. 1085, separated the ecclesiastical from the civil part of these courts; prohibiting the bishops to sit as judges, the clergy to attend as suitors, and the causes of the Church to be tried but in courts of their own (o). By this regulation, which is said to have been made in a common council of the archbishops, bishops, abbots, and chief men of the kingdom, the county courts were deprived of their most venerable judges, their most respectable suitors, and most important business. Besides this, after the departure of the bishops and clergy, the earls disdained to sit as judges, and the great barons to attend as suitors, in the county courts; which, by degrees, reduced them to their present state. This was not the worst effect of this most imprudent and pernicious regulation. For by it the kingdom was split asunder; the crown and mitre were set at variance; and the ecclesiastical courts, by putting themselves under the immediate protection of the Pope, formed the clergy into a separate state, under a

(n) Dugdale Originales Jurid. (o) Wilkins Concilia, l. 1. p. 368, 30. Hicessii Dissertat. Epistolariis, 31. 369. &c.



AND thus I conclude the point I first propounded, viz. How king William I. after his victory, dealt with the possessions of the English. Whereby it appears that there was no pretence of an universal conquest, or that he was a victor *in populum*. Neither did he claim the title of English lands upon that account, but only made use of his victory thus far, to seize the lands of such as had *OPPOSED* him; which is universal in all cases of victories, though without the pretence of conquest,

SECONDLY, therefore I come to the second general question, viz. What was done in relation to the laws.

IT is very plain, that the king, after his victory, did, as all wise princes would have done, endeavour to make a stricter union between England and Normandy. In order thereunto, he endeavoured to bring in the French instead of the Saxon language, then used in England. "Deliberavit," says Holcot, "quomodo linguam Saxoniam possit destruere, & Anglicam & Normanicam idiomate concordare; & ideo

foreign sovereign, which in the end was productive of infinite disorders.

The ecclesiastical courts, which were immediately erected in consequence, were 1. The Archdeacon's Court. For as the archdeacon was discharged from sitting as a judge, with the hundredary, in the hundred court, he was authorized to erect a court of his own, in which he took cognizance of ecclesiastical causes within his archdeaconry. 2. The Bishop's Court, or Consistory, which received appeals from the archdeacon's court, and whose jurisdiction extended over the whole diocese. 3. The Archbishop's Court, which received appeals from the consistories of the several bishops of the province, and had jurisdiction not only over the particular diocese of the archbishop, but over all the dioceses in the province. From this highest ecclesiastical court, appeals lay to the Pope, which soon became frequent, vexatious, and expensive (p).

(p) Id. *ibid.* Hen. Hist. 3 v. 339.

"ordinavit

"ordinavit quod nullus in curia regis placitaret NISI IN LIN-  
"GUA GALLICA," &c. (q). From whence arose the prac-  
tice of pleading in our courts of law in the Norman or  
French tongue; which custom continued till the statute of  
36 E. 3. c. 15.

AND as he thus endeavoured to make a community in  
their language, so possibly he might endeavour to make the  
like in their laws, and to introduce the Norman laws into  
England, or as many of them as he thought convenient.  
And it is very probable, that after the victory, the Norman  
nobility and soldiers were scattered through the whole  
kingdom, and mingled with the English; which might pos-  
sibly introduce some of the Norman laws and customs in-  
sensibly into this kingdom. And to that end the Conqueror  
did industriously mingle the English and Normans together,  
shuffling the Normans into English possessions here, and  
putting the English into possessions in Normandy, and

(q) Probably the customs of  
England were originally record-  
ed in Saxon. William declared his  
conquest by a change of laws and  
language. He had entertained  
the difficult project of totally  
abolishing the English language;  
and, for that purpose, he ordered  
that in all schools throughout  
the kingdom, the youth should be  
instructed in the French tongue;  
a practice which was continued  
from custom, till after the reign of  
Edward III. and was never in-  
deed totally discontinued in En-  
gland. The pleadings in the su-  
preme courts of judicature were  
in French. 36 Ed. 3. c. 15.  
Seld. Spicileg. ad Eadmer. 189.  
Fort. Laud. Leg. Angl. c. 48. The

deeds were often drawn in the  
same language: the laws were  
composed in that idiom. In-  
gulf. 71. 88. Chron. Rothom.  
A. D. 1066.—No other tongue  
was used at court. It became the  
language of all fashionable socie-  
ties, and the English themselves,  
ashamed of their own country,  
affected to excel in that foreign  
dialect. From this attention of  
William, and from the great fo-  
reign dominions long annexed  
to the crown of England, pro-  
ceeded that great mixture of  
French which is at present to be  
found in the English tongue,  
and which composes the greatest  
and best part of our language.  
Hen. Hist. 3 v. 354.

making

making marriages among them, especially between the nobility of both nations.

THIS gave the English a suspicion, that they should suddenly have a change of their laws before they were aware of it. But it fell out much better. For first, there arising some danger of a defection of the English, countenanced by the archbishop of York in the north, and Frederick, abbot of St. Albans, in the south; the king, by the persuasions of Lanfranc, archbishop of Canterbury,—“*pro bono pacis apud Berkhamstead juravit super animas reliquias sancti Albani tactisque sacrosanctis evangelis (ministrante juramento abbate Frederico) ut bonas & approbatas antiquas regni leges quas sancti & pii Angliæ reges ejus antecessores, & maxime rex Edvardus statuit INVIOLABILITER OBSERVARE; et sic pacificati ad propria læti recesserunt.*” Vide MAT. PARIS in *vita Frederici Abbatis sancti Albani*.

BUT although now, upon this capitulation, the ancient English laws were confirmed, and namely, the laws of St. Edward the Confessor; yet it appeared not what those laws were; and therefore, in the fourth year of his reign, we are told by Hoveden, (r) in a digression he makes in his History under the reign of king Henry II. and also in the Chronicle of Lithfield,—“*Willielmus rex anno quarto regni sui consilio baronum suorum fecit summonari per universos consulatos Angliæ Anglos nobiles & sapientes & sua lege eruditos ut eorum jura & consuetudines ab ipsis audiret, electis igitur de singulis totius patriæ comitatibus viri duodecim jurejurando confirmaverunt ut quoad possint recto tramite neque ad dextram neque ad sinistram partem divertentes legum suarum consuetudinem & sancitam patefacere nihil*

(r) Vide Hoveden, 600. See Knyghton, 2355. also Ingulf, 88. Brompton, 982

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“ prætermittentes nihil addentes, nihil prævaricando mutantes,” &c. and then sets down many of those ancient laws approved and confirmed by the king, and *COMMUNE CONCILIUM*. Wherein it appears, that he seems to be most pleased with those laws that came under the title of *LEX DANICA*, as most consonant to the Norman customs.

“ Quo auditu mox universi compatrioti qui leges dixerint  
 “ tristes effecti uno ministerio deprecati sunt quatenus permit-  
 “ teret leges sibi proprias & consuetudines antiquas habere in  
 “ quibus vixerunt patres, & ipsi in iis nati & nutriti sunt, quia  
 “ durum valde sibi foret suscipere leges ignotas, & judicare de  
 “ iis quæ nesciebant; rege vero ad flectendum ingrato existente,  
 “ tandem eum persecuti sunt deprecantes quatenus pro anima  
 “ regis Edvardi qui eas sub diem suum eis concesserat barones  
 “ & regnum & ejus, orant leges non aliorum extraneorum  
 “ cogere quam sub legibus perseverare patriis; unde consilio  
 “ habito præcatui baronem tandem acquievit,” &c.

*GERVASIUS* Tilburienfis, who lived near that time, speaks shortly, and to the purpose, thus: “ Propositis legibus Anglicanis secundum triplicitatem earum distinctionem, i. e. *Merchenlage*, *Westfaxon-lage*, & *Dane-lage*, quasdam earum reprobandas quasdam autem approbandas illis transmarinas legis *Neustriæ* quas ad regni pacem tuendam efficacissime videbantur, adjecit.”

So that by this, there appears to have been a double collection of laws, viz.

FIRST, the laws of the Confessor, which were granted and confirmed by king William, and are also called the laws of king William; which are transcribed in Mr. Selden's notes upon Eadmerus, page 173. the title whereof is thus, viz.  
 “ Hæ sunt leges & consuetudines quas Willielmus rex concessit



"cessit universo populo Angliæ post subactam terram eadem  
 "sunt quas Edvardus rex cognatus ejus observavit ante eum."  
 And these seem to be the very same that Ingulfus mentions  
 to have been brought from London, and placed by him in  
 the abbey of Crowland in the fifteenth year of the same  
 king William; "*attuli eadem vice mecum Londini in meum*  
*"monasterium legum volumen, &c."*

SECONDLY, there were certain additional laws at that  
 time established, which Gervasius Tilburienfis calls *leges*  
*Neustriæ, quæ efficacissimæ videbantur ad tuendam regni pa-*  
*cem*; which seem to be included in those other laws of king  
 William transcribed in the same notes upon Eadmerus, page  
 189. 193, &c. Which indeed were principally designed for  
 the establishment of king William in the throne, and for  
 the securing of the peace of the kingdom; especially be-  
 tween the English and Normans, as appears by these in-  
 stances, viz.

THE law *de murther*, or the common fine for a Norman  
 or Frenchman slain, and the offender not discovered: The  
 law for the oath of allegiance to the king: The introduction  
 of the trial by single combat, which many learned men  
 have thought was not in use here in England before  
 William I. [1]; and the law touching knights service, which  
 Bracton,

[1] The judicial combat, or duel, though it had been long estab-  
 lished in France and Normandy, and other countries on the continent,  
 was first introduced into England by the Normans (s). This, like  
 other ordeals, was an appeal to the judgment of God for the disco-  
 very of the truth or falsehood of an accusation which was denied,  
 or a fact that was disputed, founded on this supposition,—*that Hea-*  
*ven would always interpose, and give the victory to the champions of*

(s) Leg. Aleman. tit. 44. Burgund. part 2. c. 2. Hoveden Annal. p.  
 tit. 45. Coustumier de Normand. 343.—LL. Will. c. 62.

Bracton, lib. 2. supposes to be introduced by the Conqueror, viz.

"QUOD omnes comites milites & servientes & universi liberi  
 "homines totius regni habeant & teneant se semper bene in  
 "armis & inequis ut decet & quod sint semper prompti & bene  
 "parati ad servitium suum integrum nobis explendum & peragendum cum semper opus affuerit secundum quod nobis de  
 "feodo debent & tenementis suis de jure facere & sicut illis sta-

*truth and innocence.* As the judicial combat was esteemed the most honourable, it soon became the most common method of determining all disputes among martial knights and barons, as well in criminal as in civil causes. When the combatants were immediate vassals of the crown, the combat was performed with great pomp and ceremony; in presence of the king, with the Constable and Marshal of England who were the judges; but if the combatants were the vassals of a baron, the combat was performed in his presence. If the person accused was victorious, he was acquitted of the crime of which he had been accused; if defeated, he was thereby convicted, and subjected to the punishment prescribed by law for his offence. If he was killed, his death was considered both as the proof and the punishment of his guilt. If the accuser was vanquished, he was, by the laws of some countries, subjected to the same punishment which would have fallen upon the accused; but in England the king had a power to mitigate or remit the punishment. In civil cases, the victor gained and the vanquished lost his cause. Many laws were made for regulating the times and places of such judicial combats, the dress and arms of the combatants, and every other circumstance; which are too voluminous to be here inserted (1). Several kinds of persons were by these laws exempted from the necessity of defending their innocence, or their properties, by the judicial combat; as, women, priests, the sick infirm or maimed, with young men under twenty, and old men above sixty years of age. But all these persons might, if they pleased, employ champions to fight their causes (2).

(1) See Du Cange Gloss. voc. *Duellum*. Spelman Gloss. voc. *Compus*. Bract. l. 2. tract. 2. c. 21. Fleta, l. 1. c. 34, 35.

(2) Glanvill de Consuetud. Angl. l. 14. c. 1. --- Henry's Hist. 3 v. 355. Blac. Com. 4 v. 419.

"tuimus per commune concilium totius regni prædicti, &  
 "illis dedimus & concessimus in feodo jure hæreditario (x)."

WHEREIN we may observe, that this constitution seems to point at two things, viz. The assizing of men for arms, which was frequent under the title *de assidenda ad arma*, and is afterwards particularly enforced and rectified by the stat. of Winton, 13 Ed. 1.—and next of conventional services, reserved by tenures upon grants made out of the crown or knights service; called in Latin, *forinfecum*, or *regale servitium* (y).  
 [K.]

AND

(x) See Note [K] below. (y) Post. cap. xi. note k.

[K] Notwithstanding the authority of sir Matthew Hale, which tends to support the opinion, that feuds were introduced into this kingdom by the Conqueror, there are others who hold a contrary doctrine. Among these we may rank, sir Edward Coke, the Judges of Ireland, Mr. Selden, Nathaniel Bacon, sir William Temple, Saltern, and the author of the Mirror.—In truth the authorities on each side are numerous and respectable; I have therefore taken the liberty to subjoin the different opinions which have been published on the subject. I have ventured to enquire, without presuming to decide: satisfied with producing the opinions of others, I pretend not to establish any system of my own. Sir Edward Coke says, that "the tenure by knights service is of great antiquity, for so it was in the time of king Alfred." 1 Inst. 76. b. see id. 64. a. 83. a. But this opinion of Sir Edward Coke, Mr. Hargrave, the late and able editor of Coke on Littleton, seems, in some degree, to controvert; vide Harg. note 1. on Co. Lit. 64. a. and note 1. on id. 83. a.

Coke also, in the preface to his Third Report, supposes, that the *redditiones focbarum et reges servitium*, said in the book of Domesday, à *constitutione antiquorum temporum*, to belong to the church of Worcester, within the hundred of Aswaldhaw, prove socage tenure, and knight service, long before the Conquest.

The Judges of Ireland, in the case of tenures, supposed, that the *Tbani majores*, or *Tbani reges* among the Saxons, were the king's immediate tenants of lands, which they held by personal service, as of the king's person by grand-serjeanty, or knight service in ca-

pite 3

site; and that the land so held was in those times called Thaneland, as land holden in socage was called Reveland; and that after some years which followed the coming of the Normans, the title of Thane grew out of use, and that of Baron and Barony succeeded for Thane, and Thaneland. They therefore concluding sir Henry Spelman mistaken, who in his Glossary, *verb. Feudum*, refers the original of feuds in England to the Norman conquest, laid it down as most manifest, that *capite* tenures, tenures by knight service, tenures in socage, &c. were frequent in the times of the Saxons, but that indeed the possessions of bishops and abbots were first made subject to knight service *in capite* by William the conqueror, in the fourth year of his reign, &c. See "The Case of Tenures upon the Commission of Defective Titles," &c. 8vo. printed at London, 1720. or the substance of the case as to this point, in bishop Gibson's preface to Spelman's Treatise of Feuds, &c.

Mr. Selden, in treating of the dignity of an earl, says, that in some places in England it was both feudal and inheritable, even from the first coming of the Saxons into England, which is commonly placed in 448 of Our Saviour, though by exacter calculation it falls twenty years sooner; and that Ethelred, ealdorman of Merceland, had all that which was the kingdom of Merceland to his own use, as an earldom and fief given him in marriage with Ethelfleda, by her father king Alfred; and to prove this cites William of Malmesbury *De Gest. Regum*, lib. 2. cap. 4. "Londonium caput regni Merciorum cuidam Primario Ethelredo in fidelitatem suam cum filia Ethelfleda concessit." Vide Seld. Tit. of Hon. 510, 511. He says indeed, *ibid.* that Asferius and Florentius have it *servandum commendavit*: and if he had gone on, he would have found that William of Malmesbury himself, in the very next line, calls it *COMMISSUM*, and afterwards cap. 5. *commendatum*; which words rather suggest a trust than a feud. *Malmesb. de Gest. Regum inter Scriptores post Bedam*, fol. 44, 46. and *Spelm. Posthum. Treat. of Feuds*, 13.

Mr. Selden likewise supposes the names of Thane and Vavafor in the Saxon times, to have been feudal; and that as earl, king's thane, and middle thane, succeeded, one the other, in the Saxon laws, so count, baron, and vavafor, are used as interpreters of them in the French laws of William 1. and that the king's thanes held of the king in chief by knight service, and were of the same kind with them that were, after the Normans, honorary or parliamentary barons. Tit. of Hon. 513. and he says *ibid.* 520, that a vavafor was in the most antient times only a tenant by knight service, that either held of a mesne lord, and not immediately of the king, or at least of the king, as of an honour or manor, and not in chief.

Nathaniel, Bacon thinks that it is not clear from any author of credit, that the Normans changed the tenures of lands; and that none of them appeared to him to be of Norman original, although they



they received their names according to that dialect. Bacon Hist. of the Eng. Gov. 161.

Sir William Temple observes, that those authors who will make the Conqueror to have broken or changed the laws of England, and introduced those of Normandy, pretend that the duty of escuage, with the tenures of knight service and baronage, came over in this reign; but that it needs no proof, that those with the other feudal laws were all brought into Europe by the ancient Goths, and by them settled in all the provinces which they conquered of the Roman Empire; and among the rest by the Saxons in England, as well as by the Franks in Gaul, and the Normans in Normandy. Temp. Introd. to the History of Eng. 171, 172.

Saltern supposes conveyances by feoffment and livery to have been before the Conquest, and that there were lords and tenants in the days of Gorbodach the Good, and that fealty was sworn to the prince in the time of Elidurus; which of necessity (says he) were accompanied with tenures, services, distresses, and the like. Saltern de Antiquis Britan. Legibus, cap. 8.

And lastly, the author of the Mirror imagines that tenures were ordained for the defence of the realm, by our old kings, before the Conquest. Mirr. cap. 1. sect. 3. p. 11, 12.

In opposition to these respectable authorities, and in support of sir Matthew Hale's opinion, may be adduced the sentiments of many able and learned men. Though the accession of William to the throne of England produced no very remarkable alteration in the ranks and orders of men in society; it produced (says Dr. Henry) many important changes in their political circumstances. These changes were chiefly owing to the establishment of the feudal system in England by William I. in the same state of maturity to which it had then attained in his dominions on the continent.

"In the Anglo-Saxon times, all the proprietors of land (the clergy excepted) were subjected to the following obligations, commonly called the *trinoda necessitas*—To attend the king with their followers in military expeditions;—to assist in building and defending the royal castles;—to keep the highways and bridges in a proper state (*a*). To these three obligations, a fourth, called an heriot, was added by the laws of Canute the Great; which consisted in delivering to the king the horses and arms of his earls and thanes at their death, with certain sums of money, according to their rank and wealth (*b*). These may be called feudal prestations. But to these William I. added so many others, that he may be justly said to have completed, if not to have erected, the fabric of the feudal government in Britain.

(*a*) Hicessii dissertat. Epistol. p. 60.  
Reliquiæ Spelman. p. 22.

(*b*) Wilkins Leges Saxon.

The sovereign of a feudal state was, in idea at least, the proprietor of all the lands in his dominions (c). Part of the lands he retained in his own possession for the maintenance of his family, and support of his dignity; the rest he granted to certain of his subjects, as benefices or fees, for services to be performed by them; and on such other conditions as he thought proper to require, and they to accept. The idea of a feudal sovereign was almost realized in William I.—He beheld a very great proportion of the lands in England at his disposal, which enabled him to establish the feudal system of government in its full extent, with little or no difficulty.

In the distribution of the territory of England, he was not unmindful of the interests of the crown. He retained in his own possession no less than 1422 manors, besides forests, parks, chaces, farms, and houses, in all parts of the kingdom (d). As the hopes of obtaining splendid establishments for themselves and followers had engaged many powerful barons, and even some sovereign princes, to embark with him in his dangerous expedition, he was induced both by the dictates of honour and prudence to gratify their expectations by very liberal grants.

But none of these grants were unconditional; to all of them a great variety of obligations was annexed. These obligations were either services, which contributed to the splendor of the sovereign, and security of the kingdom; or prestations of various kinds, which constituted a considerable part of the royal revenue.

The services to be performed by the immediate vassals of the crown, were chiefly, Homage and fealty;—Personal attendance upon the king in his court, at the three great festivals of Christmas, Easter, and Whitsuntide, and in his parliament, at other times, when regularly called;—Military services in the field, or in the defence of castles for a certain time, with a certain number of men, according to the extent of estates.—By these three things, the sovereign of a feudal kingdom was secured, as far as human policy could secure him, in a splendid court for his honour, a numerous council for advice, and a powerful army for defence.

The payments or prestations, to which the immediate vassals of the crown were subjected, were chiefly,—Reserved rents;—Wardships;—On Marriages, Reliefs, Scutages, Aids.

The sovereign of a feudal kingdom never appeared in greater splendor than when he received the homage of his immediate vassals in his great court or parliament. Seated upon his throne, in his royal robes, with his crown on his head, and surrounded by his nobles, he beheld his greatest prelates and most powerful barons

(c) Somner on Gavel. 109. Smet.  
de Republic. l. 3. c. 10.

(d) Doomsday Book passim.

uncovered and unarmed, on their knees before him. In that humble posture, they put both their hands between his, and solemnly promised "to be his liege men, of life and limb and worldly worship, "to bear faith and troth to him, to live and die with him, against "all manner of men (e)."

The courts of the Anglo-Norman kings were at all times very splendid, but more especially at the three great festivals of Christmas, Easter, and Whitsuntide, when all the prelates, earls, and barons of the kingdom were, by their tenures, obliged to attend their sovereign, to assist in the celebration of these festivals, in the administration of justice, and in deliberating on the great affairs of the kingdom. The business consisted partly in determining important causes, and partly in deliberating on public affairs (f).

Military service was the greatest and most important obligation annexed to the grants of lands made by William I. and other feudal sovereigns. The intention in making these grants, was to secure a sufficient body of troops under proper leaders, well armed, and always ready to take the field, for defending the kingdom, and prosecuting such wars as were thought necessary for the honour of the prince, and the prosperity of the state (g). Lands so granted, may very well be considered as the daily pay of a certain number of troops, which the persons to whom they were granted, were obliged to keep in constant readiness for service; and therefore the number of knights fees or stipends, which every estate comprehended, was carefully ascertained. To add still further to the strength and security of the kingdom, William subjected the lands of spiritual barons to the same military services (h).

Though William and other feudal sovereigns made large grants of lands to their nobility, clergy, and other vassals, they did not relinquish all connexion with and interest in the lands. On the contrary, they granted only the right of USING the lands on certain conditions; still retaining the property, or *dominium directum*, in themselves: and to put their vassals constantly in mind of this circumstance, they always reserved certain annual payments (commonly very trifling), which were collected by the sheriffs of the counties where the lands lay (i).

(e) Spelman. Du Cange in voc. *Homagium, Ligium*. Littleton sect. 85. Bracton l. 2. c. 35. Glanvil l. 9. c. 1. Fleta l. 3. c. 16.

(f) Du Cange voc. *Curia*. Craig de Feudis, l. 2. c. 11.

(g) 4 Inst. p. 192.

(h) M. Paris, p. 3. col. 2. ann. 1070.

(i) Madox Excheq. c. 20. Craig de Feudis, l. 1. c. 9.

When a vassal of the crown died, and left his heir under age, and consequently incapable of performing those personal services to his Sovereign, to which he was bound by tenure, the king took possession of his estate, that he might therewith support the heir, and give him an education suitable to his quality, and at the same time might provide another person to perform his services in his room. This right of being the guardian of all minors, male or female, who held their lands of the crown by military services, brought considerable profits into the royal coffers, or enabled the prince to enrich his favourites, by granting them the guardianship of some of his most opulent wards (*l*).

The king's female wards could not marry any person; however agreeable to themselves and their relations; without the consent of their royal guardian, that they might not have it in their power to bestow an estate which had been derived from the crown, on one who was disagreeable to the sovereign (*l*); a cruel and ignominious servitude. No less a sum than ten thousand marks, equal to one hundred thousand pounds of our money at present, was paid to the king for the wardship and marriage of a single heiress. The servitude was afterwards extended to male heirs (*m*).

The king had not only the guardianship and marriage of the heirs of all his immediate vassals, but he demanded and obtained a sum of money from them when they came of age, and were admitted to the possession of their estates; and also from those heirs who had been of age at the death of their ancestors. This last was called RELIEF, because it relieved their lands out of the hands of their sovereign, into which they fell at the death of every possessor (*n*). Reliefs were at first arbitrary and uncertain, and of consequence the occasion of much oppression. They were afterwards fixed at the rate of one hundred shillings for a knight's fee, one hundred marks for a barony, and one hundred pounds for an earldom; which was supposed to be about the fourth part of the annual value of each (*o*).

Scutage, or shield money, was another prestation, to which the military vassals of the crown, both of the clergy and laity, were subjected. It was a sum of money paid in lieu of actual service in the field, by those who were not able or not willing to perform that service in person, or to provide another to perform it in their room.

(*l*) Craig de Feudis, l. 2. c. 2.  
Spelman Reliquie, p. 25. Gloss. voc.

Wards. Madox Excheq. c. 10. sect.

4. Glanvil l. 7. c. 9.

(*l*) Du Cange voc. *Maritagium*.  
Glanvil l. 7. c. 9.

(*m*) Madox Excheq. c. 10. sect.

4.

(*n*) Glanvil l. 9. c. 4.

(*o*) Du Cange voc. *Relivium*. Ma-

dox Excheq. c. 10. sect. 4.



The rate of this commutation was not always the same; but most commonly it was two marks for every knight's fee; though sometimes it was only twenty shillings, and at other times three marks, or two marks and a half (p).

Besides all these payments, the immediate vassals of the crown, who were presumed to be possessed of much affection and gratitude to their sovereign for the favours they had received from him, granted, or rather complied with the demand of certain pecuniary AIDs, on some great occasions, when he stood in particular need of their assistance. The occasions on which those aids were demanded and granted, were these; to make his eldest son a knight; to marry his eldest daughter; to ransom his person when he was taken prisoner. The rate of these aids was also unsettled; but it seems to have been most frequently one mark, or one pound, for every knight's fee (q).

There is sufficient evidence that all these services and prestations, so troublesome in themselves, and so liable to be rendered oppressive and intolerable, were brought from Normandy, and imposed by William on the leaders of his victorious army, to whom he granted great estates in England. But these were far from being the only persons who felt the weight of those feudal servitudes. For the Norman and other barons who received extensive tracts of lands, imitated the example of their sovereign in the disposal of them. They retained part of them, lying contiguous to their own castles, in their own possession, which were called their *Demesnes*; and the rest they granted to their followers, on terms exactly similar to those on which they had received them from the crown. The vassals of every baron did him homage, with a reservation of homage to the king, which was sometimes not much regarded.—They gave personal attendance in his court at stated times, or when regularly called.—They followed him into the field with a certain number of troops, according to the quantity of land they had received.—They paid him certain reserved rents.—Their heirs were his wards when under age.—They could not marry without his consent.—They gave him a relief, when they obtained possession of their estates; and aids for making his eldest son a knight, for marrying his eldest daughter, and for redeeming his person from captivity. In a word, a feudal baron was a king in miniature, and a barony was a little kingdom. Even the vassals of barons sometimes granted subinfeudations, but always exactly on the same plan. By this means all the distressful servitudes of the feudal system descended from the so-

(p) Du Cange voc. *Scutagium*.

*Auxilium*. Madox Excheq. c. 15.

(q) Spelman Du Cange Gloss. voc.

Glanvil l. 9. c. 9.

vergein to the meanest possessor of land by military tenure, becoming heavier as they descended lower<sup>(r)</sup>.

It is true that those possessors of land who were called *Socmen* (because, as many think, they followed the Soc or plough) were not subjected to some of the most vexatious of those feudal servitudes, as personal attendance, wardship, marriage, &c. But this was owing to the contemptible light in which they were viewed by their sovereign and his haughty barons, who would not admit them into their courts or their company; and considered the education and marriage of their heirs as matters of small importance and unworthy of their attention. Nor were many of these *Socmen* more free, or more happy than the military vassals of the king and barons. On the contrary, they were subjected to lower and more laborious servitudes, as furnishing men, horses, and carriages, on various occasions; ploughing and sowing the lands of their lords, &c. (s). In a word, the feudal system of tenures, established by William in England, was productive of universal distress and servitude; from which even those of the higher ranks were not exempted, though they were most severely felt by the lower orders in the state (t).

Craig in his treatise *De Jur. Feud.* 29. says, "Anglos ante conquestum vix puto hoc jus (scilicet feudorum) recepisse: rationes cur ita credam hæ sunt.—Scio ante conquestum multas apud Anglos leges ab Anglo-Saxonum regibus ante conquestum conscriptas—Ne vestigium quidem juris feudalis in eis pæne reperitur, nam licet vassalorum in dominos ingratitude, sive feloniam expresse aliquo statuto puniatur, poena tamen non est amissio feudi, ut in jure feudali, sed tantum vel multa pecuniaria, si parva sit injuria, vel poena capitis, si major, quæ juris feudalis naturam non sapiunt.—Præterea ex ipso Polydoro, qui Anglorum historiam conscripsit diligentissime, constat manifeste, conquestorem, cum omnia Angliæ prædia jure belli ad se pertinere diceret, legem agrariam tulisse, quâ se omnium possessionum dominum declaravit (quod nihil aliud erat quam omnia prædia de eo tanquam domino teneri,) &c."

Sir H. Spelman says, "jus feudale Anglis primus imposuit Gulielmus conquestor." (*Gloss. ad Mag. Chart. fol. 374*) And again, (*ad verbum Feodum*) "Feodorum servitutes in Britanniam nostram primus invexit Gulielmus senior conquestor nuncupatus, qui lege ea e Normanniâ introducta Angliam totam suis divisit commilitibus: inquit hoc ipsum codex ejus agrarius—(Qui) Feudum et Normanniam jungit, ac si rei novæ notitia e Normannia disquirendâ esset." And it being said by the Judges of Ireland, in the abovementioned case of tenures, that sir H. Spelman, thus referring the original of

(r) Spelman. *Du Cange Gloss. voc.*

*Baron. Feodum, Curia, Homagium, Socmannus.*

*Ward, Maritagium, Relevium, Axi-*  
*sum.*

(s) Spelman. *Du Cange Gloss. voc.*

(t) Dr. Henry 3 v. p. 329.

feuds in England to the Norman conquest, was mistaken; he wrote an elaborate treatise of the nature and original of feuds and tenures, in support of his opinion. This treatise was published by bishop Gibson 1723, among the posthumous works of this great man.

Mr. Somner says, "Before the conquest, we were not in this kingdom acquainted with what since, and to this day, we call *Feoda*, foreigners *Feuda*, i. e. Fiefs or Fees, either in that general sense I mean, wherein they are discoursed of and handled abroad in the book thence intitled *De Feudis*, at home in that called *Littleton's Tenures*." Treat. of Gav. 100. 104. And concludes, that "to the Conqueror it is, that the names and customs of our English fees, or (as we now vulgarly call them) tenures, such at least as are military, owe their introduction."

Matthew Paris, anno 1068. fol. 6. says, that William I. "comp- militibus suis qui bello Hastingenſi regionem ſecum ſubjugaverant, terras Anglorum et poſſeſſiones affluentiori manu contulit, illudque parum quod remanſerat ſub jugo poſuit perpetuæ ſervitutis." And again, anno 1070. fol. 7. he ſays, that this king "Episcopatus quoq; et abbatias omnes quæ baronias tenebant, et eatenus ab omni ſervitute ſeculari libertatem habuerant, ſub ſervitute ſtatuit militari, irrotulans ſingulos episcopatus et abbatias pro voluntate ſuo quot milites ſibi et ſucceſſoribus ſuis hoſtilitatis tempore voluit a ſingulis exhiberi: et rotulos hujus eccleſiaſticæ ſervitutis ponens in theſauris, multos viros eccleſiaſticos huic conſtitutioni peſſimæ reluctantes a regno fugavit."

Mr. Camden aſſerts, that "the Engliſh were diſpoſſeſſed of their hereditary eſtates by William I. and the lands and farms divided among his ſoldiers; but with this reſerve, that he ſhould ſtill remain the direct proprietor, and oblige them to do homage to him and his ſucceſſors; that is (ſays he), that they ſhould hold them in fee, but the king alone chief lord, and they feudatory lords, and in actual poſſeſſion."

Dr. Hody ſays, that "baronies, and ſuch tenures, were firſt brought into England by the Conqueror." Hiſt. of Convoc. 112. And Braſton, ſpeaking of the *regale ſervitium*, intimates as much in theſe words, "ſecundum quod in conqueſtu fuit adinventum." Braſt. lib. 2. cap. 16. ſect. 7.

Sir Martin Wright, in his Introduction to the Law of Tenures, 52, obſerves, that William I. about the twentieth year of his reign, (u) and not till then, ſummoned all the great men and landholders in the kingdom (x) to do their homage, and ſwear their fealty to him: from whence he infers, that this was done in conſequence of

(p) Seld. Præf. ad Eadmer. fol. 5. poſt Bedam, 908. Hoveden 460. and Mad. Excheq. fol. 6. in marg.

(x) Hen. of Huntingd. interſcript. 1086.

something new, or that these feudal engagements would have been required long before; and if so, that it is probable feudal tenures were then new. See also Dugd. Orig. Jurid. 6, Wilkins' Leg. Anglo-Saxon. fo. 288, 289. Cottoni Posthuma, 13, 14. 346. Mr. Hume is of opinion that they were introduced by the Conqueror, Hist. Eng. 1 v. oct. 270. So is Blackstone, Com. 4 v. 418. but see the fourth chapter of the second book of his Commentaries passim. Dr. Sullivan contends for the same doctrine; vide his Lectures 14, 15, seq. and 270. seq.

The laws of William the Conqueror, which he added to those of the Confessor, and by which, it is apprehended, he introduced the feudal system into this kingdom, are as follows.

L. 52. "*Statuimus (y) ut omnes liberi homines (z) feodere et sacramento affirmant, quod intra et extra (a) universum regnum Angliæ Regi Willielmo domino (b) suo fideles (c) esse volunt, terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*"

"We ordain that all freemen shall oblige themselves by homage and fealty, that within and out of the dominions of England, they will be faithful to king William their lord, his lands and honours with all fidelity every where with him will preserve, and against all enemies, foreign and domestic, will them defend."

L. 55. "*Volumus etiam ac firmiter præcipimus et concedimus ut omnes liberi homines totius monarchiæ regni nostri prædicti habeant et teneant terras suas et possessiones suas bene et in pace, libere ab omni exactione injusta, et ab omni tallagio; ita quod nihil ab eis exigatur vel capiatur nisi servitium suum liberum quod de jure nobis facere de-*

(y) *Statuimus*. This implies it was not by the king alone, but by the *commune concilium*, or, as some suppose, the Parliament; for the style of the King of England, when speaking of himself, was, for ages after, in the singular number.

(z) *Liberi homines*. These were tenants in military service, and men of trust and reputation. Brady's Answer to Petyt, p. 39.

(a) *Intra et extra universum regnum Angliæ*. These words are particular; for they deviate from the general principles of the feudal law, and were highly advantageous to William. By the feudal law, no vassal was obliged to serve his lord in war, unless it was defensive, or one he thought a just one; nor for any territories belonging to his lord which were not part of the signiory of which he held; but this would not effectually serve for the de-

fence of William. He was Duke of Normandy, which he held from France; and he knew the king of that country was jealous of the extraordinary accession of power he had gained by his new territorial acquisition, and would take every occasion, just or unjust, of attacking him there; in short, that he must be always in a state of war. Such an obligation on his tenants, of serving EVERY WHERE, was of the highest consequence for him to obtain: nor was it difficult; as most of them also had estates in Normandy, and were by self-interest engaged in its defence.

(b) *Willielmo domino suo*, not *regi*, not the oath of allegiance as king, but the path of fealty from a tenant.

(c) *Fideles*. This is the very technical word of the feudal law for a vassal.



"bent et facere tenentur, et prout statutum est eis et illis a nobis datum et concessum jure hæreditario impertum per commune concilium totius regni nostri prædicti."

"We will and firmly command and grant that all freemen of the whole monarchy of our aforesaid kingdom may have and hold their lands and possessions well and in peace, free from all unjust exactions and taillage; so as nothing be exacted or taken, save their free services, which of right they ought and are bound to perform to us, and as it was appointed to them, and given and granted to them by us as a perpetual right of inheritance by the common council of the whole kingdom."

L. 58 "Statuimus et firmiter præcipimus ut omnes comites, et barones, et milites, et servientes (d), et universi liberi homines totius regni nostri prædicti habeant et teneant se semper bene armis et in equis ut decet et oportet, et quod sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum cum super opus adfuerit, secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti, et illis dedimus et concessimus in feodo jure hæreditario (e)."

"We ordain also, and firmly command, that all earls, and barons, and knights, and servants, and all the freemen of our whole kingdom aforesaid, shall always be fitted with horses and arms as they ought to be, and always ready and well prepared to perform their whole service to us when there shall be need, according to what they ought by law to do to us, by reason of their fiefs and tenements, and as we have ordained to them by the common council of our whole kingdom aforesaid, and have given and granted to them in fee in hereditary right."

L. 59. "Statuimus et firmiter præcipimus ut omnes liberi homines (f) totius regni nostri prædicti sint fratres conjurati ad monarchiam"

(d) *Servientes*, the lower soldiers not knighted, who had not yet got lands, but were quartered on the Abbeys. Others are of opinion, that by *servientes* are meant those who held by grand or petit serjeanty.

(e) This new policy seems not to have been imposed by the Conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had

the recent example of the French nation; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners, as a *beneficium* or feud, to be held to them and such of their heirs as they had previously nominated to the King.

(f) *Liberi homines*—The freemen in this law are the same as those mentioned before; such as held in military tenure, though not knighted; for those were called *milites*; sometimes they are taken promiscuously one for the

"parchiam nostram et adregnum nostrum pro viribus suis et facultatibus  
 "contra inimicos pro posse suo defendendum et viriliter servandum, ra-  
 "cem et dignitatem coronæ nostræ integram observandam et ad judici-  
 "um rectum et justitiam constanter omnibus modis pro posse suo sine  
 "dolo et sine dilatione faciendam. Hoc decretum sancitum est in  
 "civitate London."

"We ordain also and firmly command, that all freemen of our  
 "whole kingdom aforesaid be sworn brothers, manfully to preserve  
 "and defend our monarchy or government, and our kingdom, with  
 "all their power, force, and might, against enemies, and keep entire  
 "the dignity and peace of our crown, and to give right judgment,  
 "and constantly to do justice by all ways and means, according to  
 "their power and ability, without fraud or delay. This law was  
 "enacted in the city of London."

L. 63. "Hoc quoque præcipimus ut omnes habeant et teneant legem  
 "Edwardi regis (g) in omnibus rebus, adactis hiis quas *constituimus*  
 "(b) ad utilitatem Anglorum."

"This we also command, that all our subjects have and enjoy the  
 "laws of king Edward in all things; with the addition of those which  
 "we have appointed for the benefit of the English."

Mr. Justice Blackstone and Doctor Sullivan differ as to the time  
 when William introduced the feudal system, the former conceiving  
 it to have been in the twentieth, and the latter in the fourth year of  
 his reign. It was probably in the twentieth (i)."

On the whole, it is probable that William introduced into England  
 the feudal law which he found established in France and Normandy,  
 and which, during that age, was the foundation both of the stability  
 and of the disorders in most of the monarchical governments of Eu-  
 rope.—It is not a little remarkable, that in tracing the great lines of  
 the Mexican constitution, an image of feudal policy, in its most rigid  
 form, rises to view. In truth, its spirit and principles seem to have  
 operated in the new world in the same manner as in the ancient.  
 Dr. Robertson, Hist. Amer. 2 v. 280.

the other; they were very different  
 from our ordinary freeholders at this  
 day. Answer to Petyt, p. 38, 39.  
 Glossary, by the same author, p. 32.  
 According to Sullivan, they were  
 "the Saxon freeholders, and the  
 tenants of the church, who now  
 were subjected to knight's service."

(g) *Legem Edwardi regis*—William  
 at his coronation swore to observe the  
 laws of Edward the Confessor; and

with respect to such of them as did  
 not clash with his designs, he now  
 again confirms them, adding thereto  
 the above laws and some others.

(b) The word *constituimus* implies  
 a parliamentary act; and therefore  
 extended to the Normans here, the  
 benefit of the English laws. Lyt.  
 Hist. Hen. II. 8vo. 1 v. 464. 468.

(i) Seld. pref. Ead. 5. Mad. Excheq.  
 6. in marg. Wright's Ten. 52.

AND

AND note, that these laws were not imposed *ad libitum regis*, but they were such as were settled *per commune concilium regni*; and possibly at that very time, when twelve out of every county were returned to ascertain the Confessor's laws, as before is mentioned out of Hoveden. Which appears to be **AS SUFFICIENT AND EFFECTUAL A PARLIAMENT AS EVER WAS HELD IN ENGLAND [L.]**

By

[L.] The student will find a pertinent account of the alterations of our laws under the reign of William the first, in the last chapter of the fourth volume of Mr. Justice Blackstone's Commentaries. The laws of William in the Norman language, with the Latin translation of Dr. Wilkins, as also an English one, with notes and references, were some time since published by Mr. Kelham, in his Dictionary of the Norman Language.

To ascertain the laws of Edward the Confessor, we find that William summoned twelve men from every county; and this Sir Matthew Hale will have to be "as sufficient and effectual a parliament as ever was held in England." With every deference to his authority, it is apprehended that those twelve men were not members of the legislature. If they were, how came they afterwards to be discontinued till the time of Henry the third, in whose reign we first find any account of the commons? It is more than probable, that they were summoned on a particular occasion, and for a particular purpose, which none but themselves could answer. William, on his coronation, had sworn to govern by the laws of Edward the Confessor; some of which had been reduced into writing, but the greater part consisted of the immemorial customs of the realm. Having distributed the confiscations among his followers, foreigners and strangers to those laws and customs, it of course became necessary to ascertain them; to effect which he summoned twelve Saxons from every county. That they were not legislators is evident from this, that when William wanted to revive the Danish laws, laws which had been abolished by the Confessor, but which were somewhat similar to the Norman mode of jurisprudence, they prevailed against him; not by refusing their consent, but by intreaty and adjuration. They intreated him by their tears and their prayers, and adjured him by the soul of Edward his benefactor.

Who were the constituent members of the great councils or parliaments of this period, is a question which has been differently answered and warmly agitated (†). That all archbishops, bishops, abbots, priors, earls, and barons, who held each an entire barony

(†) Petyt's Rights of the Commons Dr. Frady's Tracts, &c. &c. asserted, Jan. Angl. Facies Nova,

By all which it is apparent, first, that William I. did not pretend, nor indeed could he pretend, notwithstanding this nominal

immediately of the king *in capite*, were constituent members of these great councils, has never been denied, and needs not be proved. Besides those great spiritual and temporal barons, there were many others who held smaller portions of land, as one, two, three or four knights fees, immediately of the king, by the same honourable tenure with the great barons; who were also members of the great councils of the kingdom, and were commonly called the lesser barons, or free military tenants of the crown. Among many evidences which might easily be produced of this, the fourteenth article of the Great Charter of king John is one of the most decisive, and seems to be sufficient. "To have a common council of the kingdom, to assess an aid o'therwise than in the three foresaid cases (1), or to assess a scutage, we will cause to be summoned the archbishops, bishops, earls, and greater barons, particularly by our letters; and besides, we will cause to be summoned in general, by our sheriffs and bailiffs, all those who hold of us *in capite*." But besides all these great and small barons, who, by virtue of their tenures, were obliged, as well as entitled, to sit as members in the great councils of the kingdom; our historians of this period sometimes speak of great multitudes of people, both of the clergy and laity, who were present in some of those councils (m). Eadmerus, the friend and secretary of archbishop Anselm, thus describes the persons assembled in a great council at Rockingham, A. D. 1095, to whom his patron made a speech, "Anselm spoke to the bishops, abbots, and princes or principal men, and to a numerous multitude of monks, clerks, and laymen standing by (n)." By the bishops, abbots, and princes, we are certainly to understand the spiritual and temporal barons. But who are we to understand by "the numerous multitude of monks, clerks, and laymen standing by?" Were they members of this assembly, or were they only spectators and by-standers? If by the multitude of those clerks and laymen, the historian did not mean the lesser barons, it is highly probable that they were only spectators. We are told by several contemporary historians, that the great councils of the kingdom in those times were very much incommoded by crowds of spectators, who forced their way into their meetings. One of the historians thus describes a great council held by king Stephen: "The king, by an edict, published through England, called the

(1) These three foresaid cases were, to make his eldest son a knight; to marry his eldest daughter; to redeem his own person; in all which cases, aids were

due by tenure.

(m) Spelman. Concil. 1. 2. p. 33.

(n) Eadmeri Hist. p. 26.



nominal conquest, to alter the laws of this kingdom without common consent *in communi concilio regni*, or in parliament. And, secondly, that if there could be any pretence of any such right, or if in that turbulent time something of that kind had happened; yet by all those solemn capitulations, oaths, and concessions, that pretence was wholly avoided, and the ancient laws of the kingdom settled, and were not to be altered, or added unto, at the pleasure of the Conqueror, WITHOUT CONSENT IN PARLIAMENT.

In the seventeenth year of his reign, or, as some say, the fifteenth, he began that great survey recorded in two books, called the Great Doomsday Book, and Little Doomsday Book, and finished it in the twentieth year of his reign, anno Domini 1086, (e) as appears by the learned

(e) At the end of Doomsday hand. Mad. Exch. i v. 296. Book the date, or year, viz. Wright's Ten. 52, 53. 1086, is written in a large cœval

rulers of the churches, and the chiefs of the people, to a council at London. All these coming thither, as into one receptacle, and the pillars of the churches being seated in order, and the vulgar also forcing themselves in on all hands, confusedly and promiscuously, as usual, many things were usefully proposed, and happily transacted, for the benefit of the church and kingdom (f).” In a great council held at Westminster, May 18, A. D. 1127, the spectators, who are said to have been innumerable, were so outrageous, that they interrupted the business of the council, and prevented some things from being debated (g). Upon the whole, it seems to be almost certain, that though great numbers of people of all ranks, prompted by political curiosity, or interested in the affairs which were to be debated, attended the great councils of the kingdom in this period, none were properly members of the councils but those described in the Great Charter of king John, viz. the spiritual and temporal barons,

(f) *Gesta Stephani Regis*, apud Duchene, p. 932.

(g) *Spelman. Concil. l. 2. p. 35.*

who

learned preface of Mr. Selden to Eadmerus, and indeed by the books themselves; the original record of which is still extant, remaining in the custody of the vice-chamberlains of his majesty's exchequer. This record contains a survey of all the ancient demesne lands of the kingdom, and contains in many manors, not only the tenants names, with the quantity of lands and their values, but likewise the number and quality of the residents or inhabitants, with divers rights, privileges, and customs claimed by them. And being made and found by verdict, or presentment, of juries, in every hundred, or division, upon their oaths, there was no receding from, or avoiding, what was written in this record. And therefore, as Gervasius Tilburiensis says, page 41. "Ob hoc nos eundem librum judicarium nominamus; non quod in eo de propositis aliquibus dubiis feratur sententia, sed quod ab eo sicut ab ultimo die judicii non licet ulla ratione discedere." [M]

AND

who were personally summoned; and those who held smaller parcels of land than baronies, immediately of the king, by knight's service, who were summoned edictally by the sheriffs of their respective counties (r).

[M] The book called Domesday proves the great and extensive genius, and does honour to the memory of William. It was begun in the year 1081, and was a general survey of all the lands in the kingdom; their extent in each district; their proprietors, tenures, value; the quantity of meadow, pasture, wood, and arable land, which they contained; and in some counties, the number of tenants, cottages, and slaves of all denominations, who lived upon them. He appointed commissioners for this purpose, who entered every particular in their register by the verdict of juries; and after a labour of SIX YEARS (for the work was so long in finishing) brought him an exact account of all the landed property of his kingdom. Chron. Sax. 190. Ingulf. 79. Chron. T. Tykes, 23. H. Hunt. 370. Hoveden, 460.

(r) Hen. Hist. 3 v. 345.

M. West.

AND thus much shall suffice touching the fifth general head; namely, of the progress made after the coming in of king

M. West. 229. Flor. Wigorn. 641. Chron. Abb. St. Petri de Bungo, 31. M. Paris, 8. The three northern counties, Westmorland, Cumberland, and Northumberland, were not comprehended in this survey, on account of their wild, uncultivated situation. This monument, called **DOMESDAY BOOK**, the most valuable piece of antiquity possessed by any nation, is still preserved in the exchequer; and tho' only some extracts of it have hitherto been published, yet it serves to illustrate to us in many particulars, the ancient state of England. Alfred had finished a like survey of the kingdom in his time, which was long kept at Winchester; and which probably served as a model to William in this undertaking.

Mr. Madox in his History of the Exchequer (s) says, "the great and memorable survey of the lands holden in **DEMEANE** within this realm, which was finished in the year 1086, and is called **DOMESDAY-BOOK**, sheweth under the title **TERRA REGIS**, what and which the demesnes of the crown were, at that time, and in the time of king Edward the Confessor: and hath been ever since counted the great index, to distinguish the king's demesnes from his eschears and other lands, and from the lands of other men." It is generally known, that the question "whether lands are ancient demesne or not?" is to be decided by the **DOMESDAY** of William I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himself submitted some cases, wherein he was concerned, to be determined by it. See before note [G] on this chapter.

It may be necessary to notice some conjectures respecting the etymon of the word **DOMESDAY**. Many have supposed it to allude to the final day of judgment. Hammond apprehends, that the addition of **DAY** to this **DOVE-BOOK**, was not meant with any allusion to the final day of judgment, but was to strengthen and confirm it; and signifieth the **JUDICIAL DECISIVE RECORD**, or, **BOOK OF DOOMING JUDGMENT AND JUSTICE**. But the Observer on our Ancient Statutes goes farther: "The common etymology of the word **DOMESDAY**, (says Barrington) in which all the Glossaries agree, viz. the comparison of it to the day of judgment, never appeared to me satisfactory: if this whimsical account of the name was the real one, the Latin for it would be **DIES JUDICII**; whereas, in all the old Chronicles, it is stiled either **LIBER JUDICIALIS**, or **CENSUALIS**. Bullet, in his Celtic Dictionary, hath the word **DOM**, which he renders *Seur*, *Seigneur*, and hence the Spanish word **DON**; as also the words **DEYA** and **DEYA**, which he trans-

(s) Vol. I. 296.

king William, relating to the laws of England, their establishment, settlement, and alteration. If any one be minded to

lates PROCLAMATION, AVERTISEMENT: Domesday therefore may signify the lord's or king's advertisement to the tenants who hold under him, and this sense of the word agrees well with part of the contents of this famous survey. See likewise Upton's notes on b. 1. canto vii. ft. 26. of Spenser's *Faerie Queen*, where he produces instances of the word *DAYE* signifying judgment; and *DAYES-MAN*, an arbitrator or judge. In the north of England, an arbitrator, or elected judge, is usually termed a *dies-man*, or *days-man*: and Dr. Hammond saith, that the word *DAY* in all idioms signifies judgment. "In a petition to the king in parliament, by the treasurer and barons of the exchequer, they certify with regard to the manor of Tring in Hertfordshire, 'Invenimus in libro vestro qui vocatur Domesday, &c.'" 6 Edw. 1. A. D. 1278. amongst the collection published by the munificence of parliament (1).

Camden calls this book *Gulielmi librum censualem*, the tax book of king William; it was also called *Magna Rolla Winton*. The dean and chapter of York have a register styled Domesday; so hath the bishop of Worcester; and there is an ancient roll in Chester-castle called Doomsday-Roll.

That the reader may have some idea of the manner of entering the lands in this book, I have selected the following instances.

"Easessa Terra Regis Dimid. Hundred. de Witham. Witham tenuit Haroldus t. R. E. pro maner. et pro 5 hidis: tunc 21 villan. modo 15; tunc 9 bordar. modo 10; tunc 6 servi, modo 9; tunc 23 soche-manni, et modo similiter; tunc inter totum valebat 10 lib. modo 20; sed vicecomes inter suas consuetudines et placita, de dimid. hundred. recepit inde 34 lib. et 4 lib. de gersuma. In hoc manerio adiacebant t. R. E. 34 liberi homines, qui tunc reddebant 10 fol. de consuetudine et 11d. Ex illis tenet Ilbodius 2, de 45 acr. et val. 6 fol. et redd. maner. suam consuetudinem. Tedricus Pointel 8, de dimid. hid. et 22 acr. dimid. reddentes consuetud. Ranulph Piperel 10, de 2 hid. et 45 acr. non reddentes consuetudinem. Willielmus Grosse 5, et unus tantum reddit consuetudinem, et val. 3 lib. 13 s. Rad. Baignard 6, et unus reddit consuetud. et val' 20 s. Hamo dapifer 1, de dimid. hid. et val. 20 s. Goscelinus Loremarus habet terram unius, et non reddit consuet. &c. Modo custodit hoc manerium Petrus vicecomes in manu regis."

Thus in English: "Essex [title in the top of the leaf]; the King's Land; and before the particular manor or town, the hundred in which it lies is noted, as here, "The Half Hundred of Witham.

(1) Bar. on Stat. 270.



to see what this prince did in reference to ecclesiastics;  
let him consult Eadmerus, and the learned notes of Mr.

Selderi

" Harold held Witham, in the time of king Edward; for a manor  
" and for 3 hides. Then there were twenty-one villains, now fif-  
" teen [for they recorded what was in Edward the Confessor's time,  
" as well as in that of the Conqueror]; then there were nine bor-  
" dars, now ten; then 6 servants or slaves, now 9; then there were  
" twenty-three sochemans, now the same number; then the whole  
" was valued at ten pounds, now twenty pounds. But the viscount,  
" or sheriff, received from the half hundred, for his customs, and  
" mulcts, or forfeitures, thirty-three pounds; and four pounds for  
" fine or incomes. In this manor, or belonging to this manor, or in  
" the bounds of this manor, there were in the time of king Ed-  
" ward thirty-four freemen, which then paid an accustomed rent  
" of ten shillings and eleven pence. Of these, Ilbods holds two,  
" which had forty-five acres, and they were worth to him six shil-  
" lings, and paid their old rent to the manor. Tedric Pointel holds  
" eight, who had half a hide, and twenty-two acres and a half,  
" paying custom or old rent. Ranulph Piperel holds ten, who had  
" two hides and forty-five acres, which paid no custom or old rent.  
" William Groffe holds five, and only one of them paid custom,  
" and were worth to him three pounds thirteen shillings (by  
" the year is to be understood in all these sums). Ralph Baignard  
" holds six, and one paid custom; they were worth twenty shillings.  
" Hamo, the sewer or steward, holds one, who had half a hide, and  
" was worth to him twenty shillings. Goscelin Loremar hath the land  
" of one, and pays no custom. Peter the viscount, or sheriff, keeps  
" this manor in the king's hand."

" *Esseſſia Terra Regis Hund. de Beventre. Haveringastenuit Harol-*  
" *duſ t. R. E. pro 1 maner. et pro 10 hid. Tunc 41 villan. modo 40;*  
" *ſemp. 41 bordar. et 6 ſervi, et 2 car. in dominio; tunc 41 car. homi-*  
" *num, modo 40; ſylv. 1 d. porc. c. aer. prati; mod. 1 molen. et 2 rund.*  
" *et 10 animalia, et 160 porc. et 269. ov. Huic maner. adiacebant 4 lib.*  
" *homines, de 4 hidis, t. R. E. reddentes conſuetudinem; modo ten*  
" *3 hid. Rob. fil. Corbutiouis, Hugo de Montafori quartam hidam,*  
" *et non reddidere conſuetudinem eſſe quo eas habuere, &c. Hoc*  
" *maner. val. t. R. E. 36l. modo 40; et Petrus vicecomes inde recepiſ*  
" *80l. de cenſu, et 10l. de geſſuma."*

Thus in English: " Essex [title as before]; the King's Land;  
" the Hundred of Beventre. Harold held Haveringe, in the  
" time of Edward the Confessor, for one manor and ten hides.  
" Then there were forty-one villains, now forty; there were  
" always forty-one bordars, and six servants or slaves, and  
" two carucates in demesne, or the lord's lands; there were  
" forty-one carucates among the men, or tenants, now for-  
" ty; wood sufficient for five hundred hogs, one hundred acres of  
" meadow,

Selden upon it; especially page 167, 168, &c. where he shall find how this king divided the episcopal consistory

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from

" meadow ; now one mill, and two working-horses; or packhorses,  
 " and ten young growing beasts, one hundred and sixty hogs, and  
 " two hundred and sixty-nine sheep. To this manor there be-  
 " longed four freemen, who had four hides in the time of Edward  
 " the Confessor; paying an accustomable rent. Now Robert, son of  
 " Corbutio, holds three of those hides, and Hugh Montfort the  
 " fourth, and have paid no rent since they held them. This ma-  
 " nor was worth thirty-six pounds; now forty; and Peter the vis-  
 " count; or sheriff, receives from it eighty pounds for rent, and  
 " ten pounds for an income or fine."

The contents of Doomsday-Book are summed up in the following verses—

*Quid deberetur fisco, quæ, quanta tributa,  
 Nomine quid census; quæ vectigalia, quantum  
 Quisque teneretur feudali solvere jure,  
 Qui sunt exempti, vel quos angaria damnat;  
 Qui sunt vel glebæ servi, vel conditionis,  
 Quove manumissus parrono jure ligatur.*

This book is still remaining, fair and legible; consisting of two volumes, a greater and a less; the greater comprehending all the counties of England, except Northumberland, Cumberland, Westmorland, Durham; and part of Lancashire, which were never surveyed; and except Essex, Suffolk, and Norfolk, which are comprehended in the lesser volume. It was formerly kept under three different locks and keys; one in the custody of the treasurer, and the others of the two chamberlains of the exchequer. It is now deposited in the chapter-house at Westminster, where it may be consulted, on paying the proper officer a fee of 6s. and 8d. for a search, and 4d. per line for a transcript.

The meritorious industry of modern times has applied itself to a similar survey of one part of the kingdom, and will, it is hoped, in the end, embrace the whole of it. Sir John Sinclair, in the year 1791, published a Statistical Account of Scotland; of which it has been said, "that no publication of equal information and  
 " curiosity has appeared in Great Britain since Doomsday-Book,  
 " and that from the ample and authentic facts which it records, it  
 " must be resorted to by every future statesman, philosopher, and  
 " divine, as the best basis that has ever yet appeared for political specu-  
 " lation." On a similar, though more confined scale, is Mr. Lysons'

" Historical

from the county court, and how he restrained the clergy and their courts from exercising ecclesiastical jurisdiction upon tenants *in capite* (u).

(u) Blac. Com. 4 v. 415, 416. and see note [H] on this chapter.

" Historical Account of the Towns, Villages, and Hamlets, within  
" Twelve Miles of London."

For farther particulars concerning Domesday-Book see Spelm. Gloss. *ad verbum* Domesdei. Seld. Pref. ad. Eadm. 3, 4. Gerv. de Tilb. Dial. de Scacc. l. 1. c. 16. Ingulf. Hist. int. Script. post Bedam, 908, 909. Also an account of it printed by order of the Antiq. Soc. in 1756, and Grose's Antiq. of England and Wales. There is an extract from Doomsday-Book in the type projected by Mr. Nichols, and in which that valuable record has been since printed, in Magin's History of Thetford.

## CHAP. VI.

*Concerning the parity or similitude of the laws of England and Normandy, and the reasons thereof.*

THE great similitude that in many things appears between the laws of England and those of Normandy, has given some occasion, to such as consider not well of things, to suppose that this happened by the power of the Conqueror, in conforming the laws of this kingdom to those of Normandy; and therefore will needs have it, that our English laws still retain the mark of that conquest, and that we received our laws from him, as from a conqueror: than which assertion, as it appears even by what has before been said, nothing can be more untrue. Besides, if there were any laws derived from the Normans to us, as perhaps there might be some, yea possibly many; yet it no more concludes the position to be true, that we received such laws *per modum conquestus*, than if the kingdom of England should at this day take some of the laws of Persia, Spain, Egypt, or Assyria, and by authority of parliament settle them here: which though they were for their matter foreign, yet their obligatory power, and their formal nature or reason of becoming laws here, were not at all due to those countries, whose laws they were; but to the proper and intrinsical authority of this kingdom, by which they were received as, or enacted into, laws. And therefore, as no law that is foreign, binds here in England, till it be received and authoritatively engrafted into the law of England;



land; so there is no reason in common prudence and understanding for any man to conclude, that no rule or method of justice is to be admitted in a kingdom, though never so useful or beneficial, barely upon this account,—that another people entertained it, and made it a part of their laws before us (a).

BUT as to the matter itself, I shall consider, and enquire of the following particulars, viz.

1. How long the kingdom of England and duchy of Normandy stood in CONJUNCTION, under ONE governor.

2. WHAT evidence we have touching the laws of Normandy, and of their agreement with ours.

3. WHEREIN consists that parity, or disparity, of the English and Norman laws.

4. WHAT might be reasonably judged to be the reason and foundation of that likeness which is to be found between the laws of both countries.

(a) That there was a very great similarity between the laws of England and of Normandy, soon after the conquest, is undeniable. This similarity doth not subsist only in matters of essential justice, but in the rules of descents—in the terms of limitations—in the forms of writs; and in other things of an indifferent nature, which could neither have arisen from necessity, nor have fallen out by accident. The only question is, how this similarity was produced, Whether by the exportation of the English laws into Normandy, or the importation of the Norman laws into England? Something of both might have happen-

ed in the course of time; but in the reign of William I. it is evident, (however Sir Matthew Hale doubted it) both from the nature of things, and the concurrent testimony of historians, that the current of laws and customs ran strong from Normandy into England. Eadmeri Hist. 6. But notwithstanding the changes which were made in the ancient constitution, in the government and laws of England, by the conquest, it must not be imagined that they were quite destroyed. This was so far from being the case, that many of them were preserved and even adopted by the Conqueror. Vide cap. v.

FIRST,

FIRST, touching the conjunction under one governor of England and Normandy.

WE are to know, that the kingdom of England and duchy of Normandy were *de facto*, in conjunction, under these kings, viz. William I. William II. Henry I. king Stephen, Henry II. and Richard I. who, dying without issue, left behind him Arthur, earl of Britain, his nephew, only son of Geoffry earl of Britain, second brother of Richard I.—and John the youngest brother to Richard I. who afterward became king of England by USURPING the crown from his nephew Arthur. But the princes of Normandy still adhered to Arthur,—“*sicut domino ligo suo dicentes iudicium & consuetudinem esse illarum regionum ut Arthurus filius fratris senioris in patrimonio sibi debito & hæreditate avunculo suo succedat eodem jure quod Guelfridus pater ejus esset habiturus si regi Richardo defuncto supervixisset.*”

AND therein they said true, and the laws of England were the same. Witness the succession of Richard II. to Edward III. Also the laws of Germany and the ancient Saxons were accordant hereunto. And it was accordingly decided in a trial by battle (*b*), under Otho the emperor, as we are told by Radulphus, *de Diceto sub anno 945*. And such are the laws of France to this day; vide Chopinus *de Domanio Franciæ*, lib. 2. tit. 12. And such were the ancient customs of the Normans, as we are told by the *Grand Coutumier*, cap. 99. And such is the law of Nor-

(*b*) This species of trial is of great antiquity, but much disused; though *still in force* if the parties chuse to abide by it. Black. Com. 3 v. 337. It was introduced in England by William the Conqueror. LL. Will. cap. 68. See note [I] on chap. v. In

what cases used, see Black. Com. ibid. and 4 v. 346. Barring. on Stat. 202, 294. For the foundation and universality of this mode of trial, consult Dr. Robert's. Hist. Cha. V. 1 v. oct. 62. seq. It was authorized by the ecclesiastics. Id. 357

mandy, and of the isles of Jersey and Guernsey, which some time were parcel thereof, at this day, as is agreed by Terrier, the best expositor of their customs, lib. 2, cap. 2, And so it was adjudged, within my remembrance, in the isle of Jersey, in a controversy there, between John Perchard and John Rowland, for the goods and estate of Peter Perchard,

BUT nevertheless, John the uncle of Arthur came by force and power, "*et Rotomagum gladio ducatus Normanniæ accinctus est per ministerium Rotomagensis archiepiscopi*," as Matthew Paris says; and shortly after also usurped the crown of England, and imprisoned his nephew Arthur, who died in the year 1202, being, as was supposed, murdered by his said uncle. Vide Matthew Paris, *in fine regni regis Ricardi primi*, and Walsingham in his *Ypodigma Neustriæ, sub eodem anno 1202 (b)*.

AND

(b) Mr. Hume, in treating of the death of this unhappy prince, observes, that the circumstances which attended this deed of darkness were, no doubt, carefully concealed by the actors, and are variously related by historians: but the most probable account is as follows. The king, it is said, first proposed to William de la Brave, one of his servants, to dispatch Arthur; but William replied, that he was a gentleman, not an assassin; and positively refused compliance. Another instrument of murder was found, and was dispatched with proper orders to Falaise; but Hubert de Bourg, chamberlain to the king, and constable of the castle, feigning that he himself would execute the king's mandate, sent

back the assassin, spread the report that the young prince was dead, and publicly performed all the ceremonies of his interment: but finding that the Bretons vowed vengeance for the murder, and that all the revolted barons persevered more obstinately in their rebellion, he thought it prudent to reveal the secret, and to inform the world, that the duke of Brittany was still alive, and in his custody. This discovery proved fatal to the young prince. John first removed him to the castle of Rouen, and, coming in a boat, during the night-time, to that place, commanded Arthur to be brought forth to him. The young prince, aware of his danger, and now more subdued by the continuance

of

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AND to countenance his usurpation in Normandy, and to give himself the better pretence of title, he by his power so far prevailed there, that HE OBTAINED A CHANGE OF THE LAW THERE, purely to serve his turn, by transferring the right of inheritance from the son of the elder brother to the younger brother; as appears by the *Grand Coutumier*, cap. 99. But withal, the gloss takes notice of it as an INNOVATION, and brought in by men of power, though it mentions not the particular reason, which was as aforesaid.

THE king of France, of whom the duchy of Normandy was holden, highly resented the injury done by king John to his nephew Arthur; who, as was strongly suspected, came not fairly to his end. He summoned king John, as duke of Normandy, into France, to give an account of his actions; and upon his default of appearing, he was by king Philip of France forejudged of the said duchy. Vide Mat. Paris, *in initio regni Johannis*. And this sentence was so effectually put in execution, that in the year 1204, Mat. Paris tells us, “ tota Normannia, Turania, Andegavia, & “ Picstavia, cum civitatibus & castellis & rebus aliis præter Rumpellam, Toar, & Mar. Castellam sunt in regis Francorum “ dominium devoluta (c).”

BUT yet he retained, though with much difficulty, the islands of Jersey and Guernsey, and the uninterrupted possession of some parts of Normandy, for some time after. And both he and his son king Henry III. kept the stile and title

of his misfortunes, and by the approach of death, threw himself on his knees before his uncle and begged for mercy; but the barbarous tyrant, making no reply, stabbed him with his own hands; and, fastening a stone to

the dead body, threw it into the Seine.—Hume's Hist. 2 v. oct. 48.

(c) W. Heming, 455. M. West 264. Knyghton, 2420. Trivet, 144. Gul. Britto, l. 7. Ann. Waverl. 168.



of Dukes of Normandy, &c. 'till the 43d year of king Henry III. At which time (for 3000 livres Tournois, and upon some other agreements) he resigned Normandy and Anjou to the king of France (*d*), and never afterwards used that title, as appears by the Continuation of Mat. Paris, *sub anno* 1260. Only the four islands, some time parcel of Normandy, were still, and to this day are, enjoyed by the crown of England, viz. Jersey, Guernsey, Sarke, and Alderney, though they are still governed under their ancient Norman laws (*e*).

SECONDLY, as to the second enquiry, what evidence we have touching the laws of Normandy.

THE best, and indeed only common evidence of the ancient customs and laws of Normandy, is that book which is called the *Grand Coutumier* of Normandy, which in later years has been illustrated, not only with a Latin and French gloss, but also with the commentaries of Terrier, a French author.

THIS book does not only contain many of the ancients laws of Normandy, but most plainly it contains those laws and customs which were in use here, in the time of king Henry II. king Richard I. and king John; yea, and such also as were in use and practice in that country after the separation of Normandy from the crown of England. For we shall find therein, in their writs and processes, frequent mention of king Richard I. and the entire text of the 110th chapter thereof is an edict of Philip king of France, after the severance of Normandy from the crown of England.

(*d*) Rymer, 1 v. 675. M. 53. Trivet, 208. M. Westm. 371.  
Paris, 566. Chron. T. Tykes, (*e*) Vide post. cap. 9.

I speak not of those additional edicts which are annexed to that book, of a far later date. So that we are not to take that book as a collection of the laws of Normandy, as they stood BEFORE the accession or union thereof to the crown of England; but as they stood LONG AFTER, under the time of those dukes of Normandy that succeeded William I. And it seems to be a collection made AFTER the time of king Henry III. or, at least, AFTER the time of king John; and consequently it states their laws and customs as they stood in use and practice about the time of that collection made, which observation will be of use in the ensuing discourse.

THIRDLY, touching the third particular, viz. the agreement and disparity of the laws of England and Normandy.

It is very true, we shall find a great suitableness in their laws, in many things agreeing with the laws of England; especially as they stood in the time of king Henry II.—The best indication whereof we have in the collection of Glanville; the rules of descents, of writs, of process, of trials, and some other particulars, holding a great analogy in both dominions, yet not without their differences and disparities in many particulars (*f*), viz.

FIRST, some of those laws are such as were never used in England. For instance, there was in Normandy a certain tribute paid to the duke, called *Monya*, i. e. a certain sum yielded to him, in consideration that he should not alter their coin, payable every three years. Vide  *Coutumier*, cap. 15 (*g*). But this payment was never admitted in England.

Indeed

(*f*) Sulliv. Lect. xxix.

was a tax of one shilling on every

(*g*) *Monya*, or Moneyage, hearth; and levied once in every three

Indeed it was taken for a time, but was ousted by the first law of king Henry I. as an usurpation. Again, by the custom of Normandy, the lands descended to the *bastard zigne*, born before marriage of the same woman, by whom the same man had other children after marriage. *Coutumier*, cap. 27. But the laws of England were always contrary, as appears by Glanville, lib. 7. cap. 13. and the statute of Merton, which says, *Nolumus leges Anglicanas mutare*, &c. Again, by the laws of Normandy, if a man died without issue, or brother, or sister, the lands did descend to the father. *Coutumier*, cap. 15. Terrier, cap. 2. But in England, this law seems never to have been used.

SECONDLY, again, some laws were used in Normandy, which were in use in England LONG BEFORE the supposed Norman conquest, and therefore could in no possibility have their original force, or any binding power here, upon that pretence. For instance, it appears by the *Coutumier* of Normandy, that the sheriff of the county was an annual officer, and so it is evident he was likewise in England before the conquest. And among the laws of Edward the Confessor, it is provided, "quod aldermanni in civitatibus eandem habeant dignitatem qualem habent ballivi hundredorum in ballivis suis sub vicecomitem." Again, wreck of the sea, and treasure trove, was a prerogative belonging to the dukes of Normandy, as appears by the *Coutumier*, cap. 17, & 18. —And so it was belonging to the crown of England before the conquest; as appears by the charter of Edward the Confessor to the abbey of Ramsey, of the manor of Ringstede,

three years. It was granted to induce the sovereign not to debase the coin. Thus the prince received money from his subjects

not only for doing good, but for not doing all the evil in his power, M. Paris 38.

"cum

" cum toto ejectu maris quod wreccum dicitur," and the like. Vide *ibid.* of treasure trove, & vide the laws of Edward the Confessor, cap. 14. So fealty, homage, and relief, were incident to tenures by the laws of Normandy. Vide *Contumier*, cap. 29. And so they were in England BEFORE the conquest; as appears by the laws of Edward the Confessor, cap. 35. and the laws of Canutus, mentioned by Brompton, cap. 8.—So the trial by jury of twelve men, was the USUAL trial among the Normans, in most suits; especially in assizes, *et juris utrum*; as appears by the *Contumier*, cap. 92, 93, & 94. And THAT TRIAL WAS IN USE HERE IN ENGLAND BEFORE THE CONQUEST, as appears in Brompton among the laws of king Elthred, cap. 3. which gives some specimen of it, viz. "Habeant placita in singulis wapentachiis & exeant seniores duodecim thani vel præpositus cum iis & jurent quod neminem innocentem accusare nec noxium concealare (b)."

THIRDLY, again, in some things, though both the law of Normandy and the law of England agreed in the fact, and in the manner of proceeding, yet there was an apparent discrimination in their law from ours,—As for instance, the husband seised in right of the wife, having issue by her, and she dying, by the custom of Normandy he held—but only during his widowhood. *Contumier*, cap. 119. But in England, he held during his life, by the courtesy of England,

FOURTHLY, but in some things the laws of Normandy agreed with the laws of England, especially as they stood in the times of Henry II. and Richard I. so that they seem to be, as it were, copies or counterparts one of another. Though in many things the laws of England are since changed in a great measure from what they then were.

(b) Vide cap. 12.



For instance, at this day in England, and for very many ages past, all lands of inheritance, as well socage tenures as of knight's service, descend to the eldest son; unless in Kent, and some other places, where the custom directs the descent to ALL the males, and in some places to the youngest. But the ancient law used in England, though it directed knights services and serjeanties to descend to the eldest son, yet it directed vassalages and socage lands to descend to all the sons. Glanvil. lib. 7. cap. 3. And so do the laws of Normandy to this day. Vide *Coutumier*, cap. 26. & *post hic*, cap. 11.

AGAIN, leprosy AT THIS DAY does not impede the descent; but by the laws in use in England, in the elder times, unto the time of king John, and for some time afterwards, leprosy DID IMPEDE the descent. As *placito quarto Johannis*, in the case of W. Fulch, a judge of that time. And accordingly were the laws of Normandy. Vide *Le Coutumier*, cap. 27. and the 11th chapter of this History.

AGAIN, at this day, by the law of England, in cases of trials by twelve men, ALL OUGHT TO AGREE, and any one dissenting, no verdict can be given. But by the laws of Normandy, though a verdict ought to be by the concurring consent of twelve men, yet in case of dissent, or disagreement, of the jury, they used to put off the lesser number that were dissenters, and added a kind of *tales equal* to the greater number so agreeing, until they had got a verdict of twelve men that concurred. *Coutumier*, c. 95 (i). And we may find some ancient footsteps of the like use HERE in England, though long since antiquated;

(i) Vide cap. 12.

vide Bracton, lib. 4. cap. 19. where he speaks thus—  
 “Contingit etiam multotiens quod juratores in veritate dicenda sunt sibi contrariū ita quod in unam concordare non possunt sententiam, quo casu de consilio curiæ affertur assisa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor vel sex & adjungantur aliis, vel etiam per seipsos sine aliis, de veritate discutiant & judicent, et per se respondeant & eorum veredictum allocabitur & tenebitur cum quibus ipsi convenirent.”

AGAIN, at this day, by the laws of England, a man may give his lands in FEE-SIMPLE, which he has by descent, to any one of his children and disinherit the rest. But by the ancient laws used here, it seems to be otherwise. As Mich. 10. Johannis, Glanv. lib. 7. cap. 2. the case of William de Causeia. And accordingly were the laws of Normandy, as we find in the *Grand Coutumier*, cap. 36. “Quand le père avoit plusieurs fills, ils ne peut fairde de son heritage le un meilleur que le auter.” And yet it seems to this day, in England, it holds some resemblance in cases of frank-marriage; viz. that the doneess, in case she will have any part of her father's other lands, ought to put her lands in hotchpot (*k*).

AGAIN, by the law of England, the younger brother shall not exclude the son of the elder, who died in the life-time of the father. And this was the ancient law of Normandy, but received some interruption in favour of king John's claim. Vide *Coutumier*, cap. 25. & *hic ante*. And indeed, generally, the rule of descents in Normandy,

(*k*) Lit. sect. 17. 19, 20. 266 Brit. c. 72.  
 19 275. 292. Bract. l. 2. c. 34.

was the same, in most cases, with that of descents with us at this day. As for instance, that the descent of the line of the father shall not resort to that of the mother, *et è converso*; and that the course was otherwise in cases of purchases. But in most things, the law of Normandy was consonant to the law with us, as it was in the time of king Richard I. and king John; except in cases of descents to *bastard eigne*, excluding *mulier puisne*, as aforesaid (i).

AGAIN, at this day there are many writs now in use which were anciently also in use here, as well as in Normandy. As writs of right, writs of dower, writs *de novel disseisin*, *de mortdancestor*, *juris utrum*, *darreim presentment*, &c. And some that are now out of use, though anciently in use here in England. As writs *de feodo vel vadio*, *de feoda vel warda*, &c. All which are taken notice of by Glanville, lib. 13. cap. 27, 28, 29. And the very same forms of writs in effect were in use in Normandy, as appears by the *Coutumier*, *per totum*.—And the writ *de feodo vel vadio* (*ibid.* cap. 11.) according to Glanville, lib. 13. cap. 27. runs thus, viz. “Rex vicecomiti salutem: summane per bonos  
“ summonitores duodecim liberos & legales homines de vicineto quod sint coram me vel justiciis meis eo die parati  
“ sacramento recognoscere utrum N. teneat unam carucatam terræ in illa villa quæ R. clamat versus eum per breve  
“ meum in feodo an in vadio invadiatam ei ab ipso R. vel ab  
“ H. antecessore ejus, vel aliter si sit feodam vel hæreditas ipsius N. an in vadio invadiata ei ab ipso R. vel ab  
“ H. &c. et interim terram illam videant, &c.” Vide *ibid.*

(1) As to *bastard eigne* and *mulier puisne*, see Glanv. l. 7. c. 1. Lit. sect. 399, 400. Co. Lit. 244.—For a concise explanation of the terms, see Blac. Com. 2 v. 248.

AND according to the *Grand Coutumier*, that writ runs thus, viz. " Si rex fecerit te securum de clamore suo prosequend' summoneas recognitores de vicineto quod sunt ad primas assisas ballivæ, ad cognoscendum utrum carucata terræ in B. quod G. deforceat R. sit feodum tenentis vel vadium novum dictum per manus G. post coronationem regis Richardi & pro quanta, & utrum sit propinquior hæres ad redimendum vadium, & videatur interim terræ, &c." So that there seems little variance, either in the nature, or in the form of those writs, used here in the time of Henry II., and those used in Normandy when the *Coutumier* was made.

AGAIN, the use was in England, to limit certain NOTABLE times, within the compass of which those titles which men designed to be relieved upon, must accrue. Thus it was done in the time of Henry III. by the statute of Merton, cap. 8.—At which time the limitation in a writ of right was from the time of king Henry I.—and by that statute it is reduced to the time of king Henry II.—And for assizes of Mortdancestor, they were thereby reduced from the last return of king John out of Ireland; which was 12 *Johannis*.—And for assizes of novel disseisin, à primâ transfretatione regis in *Normanniam*; which was 5 Hen. III.—and which before that, had been post ultimum redditum *Henrici III. de Britannia*, as appears by Bracton. And this time of limitation was also afterwards, by the statutes of Westm. 1. cap. 39. and West. 2. cap. 2. 46. reduced unto a narrow scantlet, the writ of right being limited to the first coronation of king Richard I.

BUT before the limitation set by that statute of Merton, there were several limitations set for several writs. For we find among the pleas of king John's time, the limitation of writs,



writs, *de tempore quo rex Henricus avus noster fuit viduus & mortuus*. And in a writ of aiel, *die quo rex Henricus obiit* in the time of Henry II. as appears by Glanville, lib. 13. cap. 3.—There were then divers limitations in use, as in Mortdancestor, *post primam coronationem nostram, viz. Henrici secundi*, Glanvil. lib. 1. cap. 1.—And touching assizes of novel disseisin, vide *ibid.* cap. 32. where he tells us, *cum quis intra assisam, &c.* And the time of limitation in an assize was then *post ultimam meam transfretationem* (*viz. Henrici primi*) in Normanniam, lib. 13. cap. 33. But in a writ of right, as also in a writ of customs and services, it was *de tempore regis Henrici avi mei, viz. Henry I.* Vid. *ib.* lib. 12. cap. 10. 16.—And it seems very apparent, that the limitations anciently in Normandy, for all actions ancestrel, was *post primam coronationem regis Henrici secundi*, as appears expressly in the *Coutumier*, cap. 111. *De Feofe & Gage*.

So that anciently, the time of limitation in Normandy, was the same as in England, and indeed borrowed from England; *viz.* in all actions ancestrel, from the coronation of Henry II. and thus, in those actions wherein the limitation was anciently from the coronation of king Richard I. was substituted. As in the writ *de feofe & gage*, in the *Coutumier*, cap. 111. *de feofe & forme*, cap. 112. in the writ *de ley apparisan*, *ib.* cap. 24. & cap. 22. “*Afcun gage ne peut estre requise en Normandy, si il ne fuit engage post le coronement de roy Richard ou deins quarante annus.*” So that the old limitation, as well for the redemption of mortgages, as for bringing those writs above-mentioned, was *post coronationem regis Henrici secundi*; but altered; as it seems, by king Philip, the son of Lewis king of France, after king John’s ejection out of Normandy. And since the time from the coronation of king Richard I. is estimated

to bear proportion to forty years, it is probable this change of the limitation by king Philip of France, was about the beginning of the reign of king Henry III.—or about thirty or forty years after the coronation of Richard I.—from whose coronation about thirty years were elapsed, 5 *aut* 6 *Henrici* III. for anciently the limitation in this case was thirty years.

FOURTHLY, I now come to the fourth enquiry; viz. how this great parity between the laws of England and Normandy came to be effected. And before I come to it, I shall premise two observables,---which I would have the reader to carry along with him through the whole discourse, viz.---First, that this parity of laws does not at all infer a necessity, that they should be imposed by the Conqueror, which is sufficiently shewn in the foregoing chapters; and in this it will appear, that there were divers other means that caused a similitude of both laws, without any supposition of imposing them by the Conqueror. Secondly, that the laws of Normandy were, in the greater part thereof, BORROWED from ours, rather than ours from them; and the similitude of the laws of both countries did in a greater measure arise from THEIR imitation of our laws, rather than from our imitation of theirs. Though there can't be denied, but that a reciprocal imitation of each other's laws was, in some measure at least, had in both dominions. And these two things being premised, I descend to the means whereby this parity, or similitude of the laws of both countries, did arise, as follow, viz.

FIRST, Mr. Camden and some others have thought, there was ever some congruity between the ancient customs of this island and those of the country of France, both in matters religious and civil; and tells us of the ancient Druids, who were THE COMMON INSTRUCTORS OF BOTH COUN-  
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TRIES (*m*): *Gallia caufidicos docuit facunda Britanno.* And some have thought, that anciently, both countries were conjoined by a small neck of land, which might make an eafier tranfition of the cuftoms of either country to the other. But thofe things are too remote conjectures, and we need them not to folve the congruity of laws between England and Normandy. Therefore,

SECONDLY, it feems plain, that before the Normans coming in, in way of hoftility, there was a great intercourfe of commerce and trade, and a mutual communication, between thofe two countries. And the confanguinity between the two princes gave opportunities of feveral interviews between them and their courts, in each other's countries. And it is evident by hiftory, that the Confeflor, before his acceffion to the crown, made a long ftay in Normandy, and was there often; which of confequence muft have drawn many of the Englifh thither, and of the Normans hither. All which might be a means of their mutual under-

(*m*) The Druids, of whom much notice has been taken by hiftorians, have been reprefented by fome, as perfons of learning, derived to them by long tradition. They were refpected and admired, not only for knowing more than others, but for defpifing what all others valued and purfued.—By their virtue and their temperance, they reproved and corrected thofe vices in others, from which they were themfelves happily free; and made ufe of no other arms, than the reverence due to integrity, to enforce obedience to their own commands. Hence they derived fo much authority, that they were not only priefts, but judges:—no laws were inftituted without their approbation; nor any perfon punifhed, but by their condemnation. The druidical hierarchy, and the feveral inftitutions peculiar to that priefthood, do not appear to have been fettled in any part of Europe, except in the Britifh ifles and in Gaul.—According to Cæfar, whofe testimony cannot be difputed, Gaul received it from Britain. See Dr. Borlase's *Observations on the Antiquities of Cornwall*. cap. 3. 4. 5. 6. and Rowland's *Mona Antiqua Reftaurata*, the fecond. ed. by Dr. Owen.

ftanding

standing of the customs and laws of each other's country; and gave opportunities of incorporating and ingrafting divers of them into each other, as they were found useful or convenient. And therefore, the author of the Prologue to the *Grand Customier*, thinks it more probable, that the laws of Normandy were derived from England, than that ours were derived from thence.

THIRDLY, it is evident, that when the duke of Normandy came in, he brought over a great multitude, not only of ordinary soldiers, but of the best of the nobility and gentry of Normandy. Hither they brought their families; language and customs; and the victor used all his art and industry to incorporate them into this kingdom. And the more effectually to make both people become one nation, he made marriages between the English and Normans;---transplanting many Norman families hither, and many English families thither.---He kept his court sometimes here and sometimes there; and by those means insensibly derived many Norman customs hither; and English customs thither; without any severe imposition of laws on the English, as conqueror. And by this method he might easily prevail to bring in, even without the people's consent, some customs and laws, that perhaps were of foreign growth; which might the more easily be done, considering how in a short time the people of both nations were intermingled.---They were mingled in marriages; in families, in the church; in the state, in the court, and in councils; yea, and in parliaments, in both dominions.---Though Normandy became, as it were, an appendix to England, which was the nobler dominion, and received a greater conformity of their laws to the English, than they gave to it.



FOURTHLY, but the greatest mean of the assimilation of the laws of both kingdoms was this. The kings of England continued dukes of Normandy till king John's time, and he kept some footing there, notwithstanding the confiscation thereof by the king of France, as afore said. And during all this time, England, which was AN ABSOLUTE MONARCHY, had the prelation, or preference, before Normandy, which was but a FEUDAL DUCHY, and a small thing in respect of England.---By this means Normandy became, as it were, an appendant to England, and successively received its laws and government from England; which had a greater influence on Normandy, than THAT could have on England. Infomuch that oftentimes there issued precepts into Normandy, to summon persons there to answer in civil causes here; yea, even for lands and possessions in Normandy. As *placito 1 Johannis*---a precept issued to the seneschal of Normandy, to summon Robert Jeronymus to answer to John Marshal, in a plea of land, giving him forty days warning; to which the tenant appeared, and pleaded a recovery in Normandy. The like precept issued, for William de Bosco, against Jeoffry Rusham, for lands in Corbespine in Normandy.

AND on the other side, *Trin. 14 Johannis*, in a suit between Francis Borne and Thomas Adorne, for certain lands in Ford, the defendant pleaded a concord made in Normandy, in the time of king Richard I. upon a suit there before the king, for the honour of Bonn in Normandy, and for certain lands in England, whereof the lands in question were parcel, before the seneschal of Normandy, *anno 1099*. But it was excepted against, as an insufficient fine, and varying in form from other fines; and therefore the defendant relied upon it as a release.

By these, and many the like instances, it appears as follows, viz.

FIRST, that there was a great intercourse between England and Normandy, before and after the Conqueror; which might give a great opportunity of an assimilation and conformity of the laws in both countries. Secondly, that a much greater conformation of laws arose AFTER the Conqueror, during the time that Normandy was enjoyed by the crown of England, than before. And thirdly, that this similitude of the laws of England and Normandy, was not by conformation of the laws of England to those of Normandy, but by conformation of the laws of Normandy to those of England,---which now grew to a great height, perfection and glory. So that Normandy became but a perquisite, or appendant, of it.

AND as the reason of the thing speaks it, so the very fact itself attests it: for—

FIRST, it is apparent, that in point of limitation in actions ancestrel, from the time of the coronation of king Henry II. it was anciently so here in England in Glanville's time, and was transmitted from hence into Normandy. For it is no way reasonable to suppose the contrary, since Glanville mentions it to be enacted here *concilio procerum*. And though this be but a single point, or instance, yet the evidence thereof makes out a criterion, or probable indication, that many other laws were in like manner so sent hence into Normandy.

SECONDLY, it appears, that in the succession of the kings of England, from king William I. to king Henry II. the laws of England received a great improvement and perfection,

tion, as will plainly appear from Glanville's book, written in the time of king Henry II.—especially if compared with those sums, or collections, of laws, either of Edward the Confessor, William I. or Henry I. whereof hereafter.

So that it seems, by use, practice, commerce, study and improvement of the English people, they arrived in Henry the second's time to a greater improvement of the laws; and that in the time of king Richard I. and king John, they were more perfected, as may be seen in the pleadings, especially of king John's time; and though far inferior to those of the times of succeeding kings, yet they are far more regular and perfect than those that went before them. And now, if any do but compare the *Coutumier* of Normandy with the tract of Glanville, he will plainly find that the Norman tract of laws followed the pattern of Glanville, and was writ LONG AFTER it, when possibly the English laws were yet more refined and more perfect. For it is plain beyond contradiction, that the collection of the customs and laws of Normandy was made after the time of king Henry II.—for it mentions his coronation, and appoints it for the limitation of actions ancestral,—which must at least have been thirty years after. Nay, the *Coutumier* appears to have been made after the act of settlement of Normandy in the crown of France; for therein is specified the institution of Philip king of France for appointing the coronation of king Richard I. for the limitation of actions, which was AFTER the said Philip's full possession of Normandy.

INDEED, if those laws and customs of Normandy had been a collection of the laws they had had there BEFORE the coming-in of king William I. it might have been a probability that their laws, being so near like ours, might have been transplanted from thence hither. But the case is visibly otherwise. For the *Coutumier* is a collection AFTER the  
time

time of king Richard I.—yea, after the time of king John, and POSSIBLY AFTER Henry the third's time; when it had received several repairings, amendments and polishings, under the several kings of England, William I. William II. Henry I. king Stephen, Henry II. Richard I. and king John; who were either knowing themselves in the laws of England, or were assisted with a council that were knowing therein.

AND as in this tract of time the laws of England received a great advance and perfection, as appears by that excellent collection of Glanville, written even in Henry the second's time (n), when yet there were near thirty years to acquire unto a further improvement before Normandy was lost; so from the laws of England, thus modelled, polished, and perfected, the same draughts were drawn upon the laws of Normandy; which received the fairest lines from the laws of England, as they stood at least in the beginning of king John's time; and were in effect, in a great measure, the defloration of the English laws, and a transcript of them; though mingled and interlarded with many particular laws and customs of their own, which altered the features of the original in many points.

(n) Vide cap. 7.



## C H A P. VII.

*Concerning the progress of the laws of England, after the time of king William I. until the time of king Edward II.*

**T**HAT which precedes in the two foregoing chapters, gives us some account of the laws of England, as they stood in and after **THE GREAT CHANGE** which happened under king William I. commonly called the Conqueror. I shall now proceed to the history thereof in the ensuing times, until the reign of king Edward II. (a).

**WILLIAM I.** having three sons,—Robert the eldest, William the next, and Henry the youngest, disposed of the crown of England to William his second son (b), and the duchy of Normandy to Robert (c), his eldest son. And accordingly William II. commonly called William Rufus, succeeded his father in this kingdom. We have little memorable of him in relation to the laws, only that he severely pressed and extended the forest laws.

(a) See the last chapter of Mr. Justice Blackstone's Commentaries on "the rise, progress, and gradual improvements of the laws of England."

(b) William the conqueror, in his last illness, wrote to Lanfranc, archbishop of Canterbury, desiring him to crown William, his second son, king of England. Gul. Gemet. p. 292. Order. Vital. p. 659. Chron. de Mailr. p. 161. Malmesb. p. 112. H. Hunt. p. 371. Hoveden, p. 460. M. Westm. p. 230. But see Lord Lyttelton's Hist. Hen. II.

17. Oct. 75. The three successors of the Conqueror—William, Henry, and Stephen, in the estimation of many, were no better than usurpers; they certainly reigned with disputed titles.

(c) He left HIM Normandy and Maine, and bequeathed to Henry nothing but the possessions of his mother Matilda; but foretold, that he would, one day, surpass both his brothers in power and opulence. Order. Vital. 659. Gul. Neustr. 357. Fragm. de Gul. Conq. 32.

**HENRY**

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HENRY I. son of William I. and brother of William II. succeeded his said brother in the kingdom of England, and afterwards expelled his eldest brother Robert out of the duchy of Normandy also. He proceeded much in the benefit of the laws (*d*), viz.

FIRST, he restored the free-election of bishops and abbots, which before that time he and his predecessors invested *per annulum & baculum*; yet reserving those three ensigns of the patronage thereof, viz. *conge d' eslire*, custody of the temporalities, and homage upon their restitution. Vide HOVEDEN *in vita sua*,

BUT secondly, the great essay he made, was the composing an abstract or manual of laws, wherein he confirmed the laws of Edward the Confessor, “cum illis emendationibus quibus eam pater meus emendavit baronum suorum concilio;” and then adds his own laws, some whereof seem to taste of the canon law (*e*). The whole collection is transcribed in the Red Book of the exchequer; from whence it is now printed in the end of Lambard's Saxon Laws, and therefore not needful to be here repeated (*f*).

(*d*) Henry executed justice, and that with rigour; the best maxim which a prince in that age could follow. Stealing was first made capital in this reign; and false coining, which was then a very common crime, and by which the money had been extremely debased, was severely punished by Henry. Sim. Dugdale. 231. Brompton. 1000, Flor. Wigorn. 653. Hoveden, 471. Annal. Waverl. 149.

(*e*) There is a code which

passes under the name of Henry I. but the best antiquarians have agreed not to think it genuine. It is, however, a very ancient compilation, and may be useful to instruct us in the manners and customs of the times. We learn from it, that a great distinction was then made between the English and Normans, much to the advantage of the latter. LL. Hen. I. sec. 18. 75.

(*f*) Lamb. Arch. 175. Wilk. Leges Ang. Sax. 233.

THEY

THEY, for the most part, contain a model of proceedings in the county courts, the hundred courts, and the courts leet; the former to be held twelve times in the year, the latter twice; and also of the courts baron. These were the ordinary usual courts, wherein justice was then, and for a long time after, most commonly administered.—Also they concern criminal proceedings, and the punishment of crimes, and some few things touching civil actions and interests; as in chapter 70, directing descents, viz.

“ SI quis sine liberis decesserit pater aut mater ejus in hæ-  
 “ reditatem succedant, vel frater vel soror, si pater & mater  
 “ desint; si nec hos habeat, frater vel soror patris vel matris,  
 “ & deinceps in quantum genetalium, qui cum propiores in  
 “ parentela sint hæreditario jure succedant; et dum virilis  
 “ sexus extiterit & hæreditas abinde sit femina non hæredite-  
 “ tur; primum patris feodum primogenitus filius habeat.  
 “ Emptiones vero & deinceps acquisitiones det cui magis  
 “ velit, sed si Bockland habeat quam ei parentes dederint  
 “ mittat eam extra cognationem suam (g).”

I HAVE observed and inserted this law, for two reasons, viz. First, to justify what I before said, that the laws of Normandy took the English laws for their pattern in many things. Vide *Le Contumier*, cap. 25, 26, 36, &c. And secondly, to see how much the laws of England grew and increased in their particularity and application, between this time and the laws of William I. ;—which in chapter 36, has no more touching descents than this, viz.—“ Si quis intestatus obierit, liberi ejus hæreditatem equaliter dividant.” But process of time grafted thereupon, and made particular provisions for particular cases, and added distributions and subdivisions to those general rules,

(g) Blac. Com. 4 v. 421.

THESE

THESE laws of king Henry I. are a kind of miscellany, made up of those ancient laws called the laws of the Confessor and king William I. and of certain parts of the canon and civil law, and of other provisions, that custom and the prudence of the king and council had thought upon, chosen, and put together.

KING Stephen succeeded, BY WAY OF USURPATION, upon Maud, the sole daughter and heir of king Henry I (*b*),

THE laws of Henry I. grew tedious and ungrateful to the people, partly because new, and so not so well known; and partly because more difficult and severe than those ancient laws called the Confessor's. For Walsingham, in his *Ypodigma Neustrie*, tells us, that the Londoners petitioned queen Maud, "*ut liceret eis uti legibus sancti Edvardi & non legibus patris sui Henrici, quia graves erant (i);*" and

(*b*) Matilda, or, as Hale calls her, Maud, was the only legitimate issue of Henry I. and whom he betrothed to the emperor Henry V. but he dying without issue, Henry bestowed her on Geoffrey, the eldest son of Fulk, count of Anjou. Though Henry by his will left his daughter Matilda all his dominions, yet, independent of that disposition, she was most unquestionably heir to the kingdom of England. In the progress and settlement of the feudal law, the male succession to fiefs had taken place some time before the female was admitted; and estates being considered as military benefices, not as property, were transmitted to such only as could serve in the armies, and perform in person, the conditions upon which they

were originally granted. But after that the continuance of rights, during some generations, in the same family, had, in some measure, obliterated the primitive idea, the females were gradually admitted to the possession of feudal property; and the same revolution of principles which procured them the inheritance of private estates, naturally introduced their succession to government and authority. The failure, therefore, of male heirs to the kingdom of England and duchy of Normandy, seemed to leave the succession open, without a rival, to Matilda. See Lord *Lyt. Hist. Hen. II. i v. oct. 231. seq.*

(*i*) *Contin. Flor. Wig. 677. Gervase, 1355.*

that



that her refusal gave occasion to their defection from her, and strengthened Stephen in his usurpation; who according to the method of usurpers, to secure himself on the throne, was willing and ready to gratify the desires of the people herein. He furthermore took his oath, that he would not retain in his hands the temporalities of the bishops; that he would remit the severity of the forest laws; and that he would also remit the tribute of Danegelt [A]. But he performed nothing.

His

[A] When the invasions of the Danes were frequent and formidable, it was customary either to bribe them to desist from depredation, or to maintain a considerable body of troops to defend the coasts against those dangerous enemies. The ordinary revenues of the crown being inadequate to the expence, it became necessary, with consent of the Witen-gemote, to impose a tax, first of one Saxon shilling, afterwards of two or more, on every hide of land in the kingdom. As there were 243,600 hides of land in England, this tax, at one shilling on each hide, raised 22,180 Saxon pounds; equal in quantity of silver, to about 36,540 pounds sterling, and in efficacy, to more than 360,000 pounds of our money at present. This tax seems to have been first imposed A. D. 991, and was called Danegeld, or the Danish tax of payment (a). It was soon after raised to two, at last to seven shillings on every hide of land, and continued to be levied long after the original occasion of imposing it had ceased. While the invasions of the Danes were almost annual, our kings derived little profit from this tax; but after the accession of the Danish princes to the throne of England, it became one of the chief branches of the royal revenue. It was raised so high, and collected with so much severity, by Canute, A. D. 1018, that it amounted to the prodigious sum of 71,000 Saxon pounds, besides 11,000 of the same pounds paid by the City of London (b). It appears, however, from very good authority, that this was too great a sum for England to pay in one year, at that time. "The tribute (says an Author of those times, preserved by Mr. Leland) that was paid annually by the English to the Danes, was at length raised to 72,000 pounds and more, besides 11,000 pounds paid by the City of London. Those who had money to pay their portion of this grievous tax, paid it; but those who had not

(a) Chron. Saxon. 126, 128. LL. Edw. Conf. sect. 12.

(b) Id. p. 151.

" money,

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His times were troublesome. He did little in relation to the laws. Nor have we any memorial of any record touching his proceedings therein, only there are some few pipe rolls of his time, relating to the revenue of the crown (*k*).

**HENRY II.** the son of Maud, succeeded Stephen. He reigned long, viz. about thirty-five years. And though he

"money, irrecoverably lost their lands and possessions. The church of Peterborough, and several other churches, sustained great losses on that occasion (*c*). From these accounts it is evident, that this tax had been gradually raised from one shilling to seven shillings on each hide of land. It was afterwards reduced to four shillings on each hide; at which rate it seems to have continued till it was finally abolished. It was remitted in the reign of Henry the second. Houses in towns were subjected to this tax: an house of a certain value paid the same as a hide of land (*d*).

(*k*) The advancement of Stephen to the throne procured him neither tranquility nor happiness; and tho' the situation of England prevented the neighbouring States from taking any durable advantage of her confusions, yet her intestine disorders were to the last degree ruinous and destructive. The Court of Rome, during these disorders, was permitted to make farther advances in her usurpations; and appeals to the pope, which had been always strictly prohibited by the English laws, became now common in every ecclesiastical controversy. H. Hunt. 395. In this turbulent reign, the Pandects of Justinian were brought into England from Rome, by some of the attendants of archbishop Theobald. Vacarius, prior of Bec, read lectures upon them to

very crowded audiences. J. Sarisburien. l. 8. c. 22. p. 672. Great opposition, however, was made to the introduction of those laws. — John of Salisbury tells us, that he had seen some, who were so much enraged against them, that whenever they met with a copy of the Roman law, they either tore it in pieces, or threw it into the fire. Stephen, out of hatred to the archbishop, joined in this opposition; he even published an edict, imposing silence on Vacarius, and prohibiting any one to read the books of the civil law: but it did not answer the purpose for which it was intended. Seld. apud Fletam, c. 7. From this reign, therefore, we are to date the introduction of the Roman civil and canon laws into this realm. Blac. Com. 4 v. 421.

(*c*) Leland's Collectanea, 1 v. 11.

(*d*) Hen. Hist. 2 v. 260.

was not without great troubles and difficulties; yet he built up the laws and the dignity of the kingdom to a great height and perfection (*l*). For;

FIRST, in the entrance of his government, he settled the peace of the kingdom (*m*). He also reformed the coin (*n*); which was much adulterated and debased in the times and troubles of king Stephen; “*et leges Henrici avi sui præcepit per totum regnum inviolabiliter observari.*” Hoveden.

SECONDLY, against the insolences and usurpations of the clergy, he by the advice of his court or parliament, at

(*l*) He was, perhaps, the greatest prince of his time, for wisdom, virtue and ability—his character, both in public and in private life, being almost without a blemish. He possessed every accomplishment, both of body and mind, which makes a man either estimable or amiable. He occupied himself for several years in the administration of justice, in the execution of the laws, and in guarding against those inconveniencies, which either the past convulsions of his state, or the political institutions of that age, unavoidably occasioned. The provisions which he made, shew such a largeness of thought as qualified him to become a legislator; and they were commonly calculated for the future, as well as for the present happiness of his kingdom. His exactness in administering justice had gained him so great a reputation, that even foreign and distant princes made him an arbiter, and submit-

ted their differences to his judgment. Rymer, vol. iv. 43. Bened. Abb. 172. Diceto, 597. Brompton, 1120. See his History and of the age in which he lived, by lord Lyttelton; an elaborate work, enriched with illustrations of the ancient laws and constitution of England.

(*m*) The title of Henry the second to the crown was more unexceptionable than those of his three predecessors; he nevertheless thought it prudent, on his accession, to conciliate the affections of his subjects, by granting them a charter, confirming one which had been before granted by his grandfather Henry the first. Blac. Law Tr. 2 v. p. 112.

(*n*) He repaired the coin, which had been extremely debased during the reign of his predecessor; and took proper measures against the return of like abuses. Hoveden, 491.

Clarendon;

Clarendon, enacted those sixteen articles mentioned by Mat. Paris, *sub anno* 1164. They are long, and therefore I remit you thither for the particulars of them [B].

'Tis

[B] About the middle of the twelfth century, the ecclesiastics, having renounced all immediate subordination to the civil magistrate, openly pretended to an exemption, in criminal accusations, from a trial before courts of justice; and were gradually introducing a like exemption in civil causes: in fact, HOLY ORDERS WERE BECOME A FULL PROTECTION FOR ALL ENORMITIES (a).

Henry II. therefore deeming it necessary to define with precision the exact boundaries of the civil and ecclesiastical jurisdictions, on the 25th of January 1164, summoned a general council of the nobility and prelates at Clarendon, to whom he submitted the important question.

After great contention between the temporal barons and the bishops, they at length adjusted, and signed, a charter, or code of laws, called the Constitutions of Clarendon: sixteen of its articles related particularly to ecclesiastical matters, whereof the ten following were the most contradictory to the pretensions of the clergy and the see of Rome.

First, if any dispute shall arise concerning the advowson and presentation of churches, between laymen, or between ecclesiastics and laymen, or between ecclesiastics, let it be determined in the court of our lord the king (b).

Secondly,

(a) It is not easy to fix with precision when the ecclesiastics first began to claim exemption from the civil jurisdiction. It is certain, that during the early and purest ages of the Church, they pretended to no such immunity. Then the authority of the civil magistrate extended to all persons, and to all causes. What was at first an act of complaisance, flowing from veneration for their character, was in process of time, improved into exemption. Du Cange, in his *Glossary*, voc. *Curia Christianitatis*, has collected most of the causes with respect to which the clergy arrogated an exclusive jurisdiction; and refers to the authors, or original papers, which

confirm his observations. Giannone, in his *Civil History of Naples*, lib. 19. sect. 3. has ranged these under proper heads, and scrutinizes the pretensions of the Church with boldness and discernment.

(b) Before the establishment of the spiritual court in England, rights of advowson were tried in the county courts, where the presence of the king's officer and other lay assistants prevented partial and unjust decisions by the ecclesiastical judge. But after the separation of the ecclesiastical and civil jurisdictions by William the conqueror, the clergy endeavoured to draw all causes of this nature into the spiritual court, which was very prudently



'Tis true, Thomas Becket, archbishop of Canterbury, boldly and **INSOLENTLY** took upon him to declare many of those articles void; especially those five mentioned in his epistle to his suffragans, recorded by Hoveden; viz.

First,

Secondly, ecclesiastics arraigned and accused of any matter, being summoned by the king's justiciary, shall come into *his* court, TO ANSWER THERE, concerning that which, it shall appear to the king's court, is cognizable there; and shall answer in the ecclesiastical court, concerning that which, it shall appear, is cognizable there; so that the king's justiciary shall send to the court of holy church, to see in what manner the cause shall be tried there: and if an ecclesiastic shall be convicted, or confess the crime, the Church ought not any longer to give him protection.

Thirdly, it is *unlawful* for archbishops, bishops, and any dignified *clergymen of the realm*, to go out of the realm without the king's licence; and if they shall go, they shall, if it so please the king, give security, that they will not, either in going, staying, or returning, procure any evil, or damage, to the king, or the kingdom (c).

Fourthly, persons excommunicated ought not to give any security by way of deposit, nor take any oath, but only find security and pledge to stand to the judgment of the Church, in order to absolution (d).

Fifthly, no tenant IN CHIEF of the king, nor any of the officers of his household, or of his demesne, shall be excommunicate, nor shall the lands of any of them be put under an interdict; unless application shall first have been made to our lord the king, if he be in the kingdom; or, if he be out of the kingdom, to his justiciary; that he may do right concerning such person; and in such manner, as that what shall belong to the king's court shall be there deter-

dently resisted by the civil power in those days, and the trial thereof reserved to the king's supreme court. *Ld. Lytt. Hist. Henry II. vol. 4. oct. 371.*

(c) This was enacted to prevent the too frequent and dangerous intercourse between the pope and English prelates. The words in the original constitution, *persona regni*, should be translated **DIGNIFIED** *clergymen*.

Vide *Titles of Honour*, 732. It takes in all *clergymen* who held of him *in chief*, but does not here extend to all parsons, or beneficed *clergymen*, as the word is commonly translated.

(d) The words in the original are, "non debent dare *vadium ad remanens*," which being somewhat obscure, have been differently translated by different authors.

mined,

first, that there should be no appeal to the bishop without the king's licence. Secondly, that no archbishop or bishop should go over the seas, at the pope's command, without the

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king's

mined, and what shall belong to the ecclesiastical court shall be sent thither, that it may be there determined (e).

Sixthly, concerning appeals, if any shall arise, they ought to proceed from the archdeacon to the bishop, and from the bishop to the archbishop. And, if the archbishop shall fail in doing justice, the cause shall at last be brought to our lord the king, that by his precept the dispute may be determined in the archbishop's court; so that it ought not to proceed any farther without the consent of our lord the king (f).

Seventhly,

(e) One reason assigned for this, by the authors of those times, is, that the king, should not ignorantly be exposed to converse with an excommunicated person; to prevent which, notice to the king would have been sufficient; whereas the constitution itself declares the intention to be, that the king may do right concerning such person. And it not only secures the persons of the king's tenants and officers from excommunication, but also their lands from an interdict, without application to him. In truth, it was meant as a check upon the power of the spiritual court, and, as appears from Eadmer, was coeval with the establishment of that court in England. Yet the latter part of it shews, that it did not take from thence all power of inflicting the discipline of the Church on scandalous sinners, because they held of the king, or served him as his officers; but only prevented the exercise of that jurisdiction over his tenants and officers, without a reasonable cause, or in cases not properly cognizable there, but belonging to his courts of civil or criminal justice. The only fault of this law seems to have been the limitation of it, in making that a privilege of one class of the people, which was a right due to all. Ibid. 372.

(f) In a letter of the bishop of London to the pope, concerning the dispute between the king and Becket, he explains this constitution as being no prohibition of appeals to Rome, but only a check on their being carried thither unnecessarily, and without the leave of the king. His words are, "In appellationibus ex antiqua regni sui consuetudine id sibi vindicat (rex scilicet) honoris et oneris, ut ob civilem causam nullus clericorum regni sui ejusdem regni fines exeat, nisi, an ipsius autoritate et mandato jus suum obtinere queat, experiendo cognoscatur. Quod si nec sic obtinuerit, ad excellentiam vestram, ipso in nullo reclamante, cum volet quilibet appellabit." Without question there is not in the words of this constitution any direct prohibition of appeals to Rome; it being only declared, that, upon an appeal from the archdeacon, the cause ought not to proceed any further than the archbishop's court without consent of the king. But in effect this restraint would generally have stopped the cause in that court; and it manifestly asserted the royal supremacy, by subjecting the power of appealing to Rome, in ecclesiastical causes, to the will and pleasure

king's licence. Thirdly, that the bishop should not excommunicate the king's tenants *in capite* without the king's licence.

Seventhly, if there shall arise any dispute between an ecclesiastic and a layman, or between a layman and ecclesiastic, *about any tene-ment*, which the ecclesiastic pretends to be held in *frank almoigne*, and the layman pretends to be a *lay fee*, it shall be determined before the king's chief justice, *by the trial of twelve lawful men*, whether the tenelement belongs to frank almoigne, or is a lay fee; and if it be found to be frank almoigne, then it shall be pleaded in the ecclesiastical court; but if a lay fee, then in the king's court; unless both parties shall claim to hold of the same bishop or baron: but if both shall claim to hold the said fee under the same bishop, or baron, the plea shall be in *his* court: provided that by reason of such trial, the party who was first seised shall not lose his seisin till it shall have been finally determined by the plea.

Eighthly, whosoever is of any city, or castle, or borough, or demefne manor, *of our lord the king*, if he shall be cited by the archdeacon or bishop for any offence, and shall refuse to answer to such citation, it is allowable to put him under an interdict; but he ought not to be excommunicated, before the king's chief officer of the town be applied to, that he may by due course of law compel him to answer accordingly; and if the king's officer shall fail therein, such officer shall be at the mercy of our lord the king; and then the bishop may compel the person accused by ecclesiastical justice.

Ninthly, pleas of debt, whether they be due by faith solemnly pledged, or without faith so pledged, belong to the king's judicature (g).

Tenthly, when an archbishoprick, or bishoprick, or abbey, or priory, *of royal foundation*, shall be vacant, it ought to be in the

pleasure of the king: whereas the pope claimed the right of receiving such appeals, as inherent in his see. Henry's desire of gaining the consent of the bishops to this constitution, was the reason of his avoiding an express prohibition; but he intended it should have the same operation, and the pope saw that intent. Ibid. 373.

(g) The clergy of England began first in the reign of king Stephen to extend their jurisdiction in the spiri-

tual courts to the trial of persons for breach of faith, *pro lesione fidei*, in civil contracts; by which means they drew thither a vast number of causes which belonged to the civil courts, and of which they had no proper cognizance. To this encroachment they were instigated by the bishops of Rome, and therefore Alexander condemned the above-recited statute, which was made to prevent it.

licence. Fourthly, that the bishop should not have the conuzance of perjury, or *fidei lassionis*. And, fifthly, that

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hands of our lord the king, and he shall receive all the rents and issues thereof, as of his demesne; and when that church is to be supplied, our lord the king ought to send for the principal clergy of that church, and the election ought to be made in the king's chapel, with the assent of our lord the king, and the advice of such of the prelates of the kingdom as he shall call for that purpose; and the person elect shall there do homage and fealty to our lord the king, as his liege lord, of life, limb, and worldly honour, (SAVING HIS ORDER) before he be consecrated (b).

The king, thinking that he had now finally prevailed in this great enterprize, sent the constitutions to pope Alexander, requiring his ratification: but Alexander, who plainly saw that they were calculated to establish the *independency* of England, absolutely condemned, in the strongest terms, the ten articles above recited, and only ratified the following six, viz.

1. Churches belonging to the fee of our lord the king cannot be given away in perpetuity, without the consent and grant of the king.

2. Laymen ought not to be accused, unless by certain and legal accusers and witnesses, in the presence of the bishop, so as that the

(b) The saving clause at the end certainly opened a wide door to elude all the obligations contracted by the prelates in the act of homage and oath of fealty; though it is affirmed by Becket, in a letter to the pope, that "the same form was then used by the whole Christian church." He likewise adds, that when his holiness absolved him from an oath which he had taken at Clarendon, that pontiff told him, that "not even for the preservation of his life should a bishop lay himself under any obligation without a *SAVING* to his order, and to the honour of 'God:'" to which he adhered most pertinaciously. As for the form of election which is laid down in this statute, it must be observed, that the making it, in the king's chapel, by the principal clergy of the vacant church, with the advice

only of such of the prelates of the kingdom as he should call for that purpose, seems to have been a practice of no very ancient date; not older than the reign of Henry I. or William Rufus. For Mr. Tyrrel, in the introduction to his History of England, has proved by many authorities, (see Chron. Sax. edit. Oxon. p. 174.) that during the times of the Saxons, the English prelates had been usually elected in the Witenagemote, or great council, with the advice or concurrence of the whole assembly. It likewise appears from the Saxon Chronicle, that the same form was continued under William I. But whatever form had been kept up in those, or was continued in these times, the chief power in the elections, was, by the constitution of the kingdom, assigned to the king.

archdeacon



the clergy should be convened before lay judges, and that the king's courts should have conuzance of churches and of tythes.

THIRDLY, he raised up the municipal laws of the kingdom to a greater perfection, and a more orderly and regular admi-

archdeacon may not lose his right, nor any thing which should thereby accrue to him : and if the offending persons be such, as that none will or dare accuse them, the sheriff, being thereto required by the bishop, shall swear twelve lawful men of the vicinage, or town, before the bishop, to declare the truth, according to their conscience.

3. Archbishops, bishops, and all dignified clergymen, who hold of the king in chief, have their possessions from the king *as a barony*, and answer thereupon to the king's justices and officers, and follow and perform all royal customs and rights, and, like other barons, ought to be present at the trials of the king's court with the barons, till the judgment proceeds to loss of members or death.

4. If any nobleman of the realm shall forcibly resist the archbishop, bishop, or arch-deacon, in doing justice upon him or his, the king ought to bring them to justice ; and if any shall forcibly resist the king in his judicature, the archbishops, bishops, and arch-deacons, ought to bring him to justice, that he may make satisfaction to our lord the king.

5. The chattels of those who are under forfeiture to the king, ought not to be detained in any church, or church-yard, against the king's justiciary ; because they belong to the king, whether they are found within churches or without.

6. The sons of villeins ought not to be ordained without the consent of their lords, in whose lands they are known to have been born.

A transcript of the Constitutions of Clarendon, from the *Cottonian* manuscript of Becket's life and epistles, which is probably the most antient and correct copy, is in lord Lyttelton's Henry the Second.

These statutes were not only enacted by the advice and authority of parliament, but after a strict enquiry into the law and customs of the realm anterior to that time ; and which these statutes only revived and confirmed. The preamble says, " in presentia ejusdem " *regis facta est ista recordatio vel recognitio cujusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum*, " *videlicet, regis Henrici avi sui et aliorum, quæ observari et teneri debent in regno.*"

nistratorem

nistration than before. 'Tis true, we have no record of judicial proceedings so ancient as that time, except the PIPE ROLLS in the exchequer, which are only accounts of his revenue. But we need no other evidence hereof, than the tractate of Glanville, which though perhaps it was not written by that Ranulphus de Glanvilla who was *justitiarius Angliæ* under Henry II. yet it seems to be wholly written at that time (o). By that book, though many parts thereof are at this day antiquated and altered, and in that long course of time which has elapsed since that king's reign, much enlarged, reformed, and amended; yet by comparing it with those laws of the Confessor and Conqueror, yea, and the laws of his grandfather king Henry I. which he confirmed, it will easily appear, that the rule and order, as well as the administration of the law, was greatly improved beyond what it was formerly. And we have more footsteps of their agreement and concord herein with the laws, as they were used from the time of Edward I. and downwards, than can be found in all those obsolete laws of Henry I. which indeed were but disorderly, confused, and general things; rather the cases and shells of directing the way of administration, than institutions of law, if compared with Glanville's tractate of our laws.

(o) Sir Edward Coke (4 Inst. 345.) says, that this book was first printed "by the persuasion and procurement of sir William Stanford, a grave and learned judge of the common pleas A. D. 1554. 1 & 2 Ph & M.—" *Henricus rex Angliæ pater constituit* " (says Hoveden) *Ranulphum de Glanvilla summum justic. totius Angliæ, cujus sapientia conditæ sunt leges subscriptæ*

" *quas Anglicanas vocamus.*" Hov. A. D. 1180. et reg. H. 2. 26. Plowd. 368. Sulliv. Lect. 130. 148. 288.—This book of Glanville (*Tractatus de Legibus & Consuetudinibus Angliæ*) is supposed to have been the first undertaking of the kind, in any country of Europe. It was composed about the year 1181.—Robertf. Cha. V. 1 v. oct. 382.

FOURTHLY, the administration of the common justice of the kingdom seems to be wholly dispensed in the county courts, hundred courts, and courts baron; except some of the greater crimes reformed by the laws of king Henry I. and that part thereof which was sometimes taken up by the *justitarius Angliæ*. This doubtless bred great inconvenience, uncertainty, and variety in the laws, viz.

FIRST, by the IGNORANCE of the judges, which were the freeholders of the county. For although the alderman, or chief constable of every hundred, was always to be a man learned in the laws; and although, not only the freeholders, but the bishops, barons, and great men, were by the laws of king Henry I. appointed to attend the county court, yet they seldom attended there; or if they did, in process of time they neglected to study the English laws, as great men usually do.

SECONDLY, another inconvenience was, that this also bred GREAT VARIETY of laws, especially in the several counties. For the decisions, or judgments, being made by divers courts, and several independent judges and judicatories, who had no common interest among them in their several judicatories; thereby, in process of time, every several county would have several laws, customs, rules, and forms of proceeding;--which is always the effect of several independent judicatories, administered by several judges.

THIRDLY, a third inconvenience was, that all the business of any moment was carried by parties and factions. For the freeholders being generally the judges, and conversing one among another, and being as it were the chief judges, not only of the fact, but of the law; EVERY MAN THAT HAD

A SUIT

A SUIT THERE, SPED ACCORDING AS HE COULD MAKE PARTIES. And men of great power and interest in the county did easily overbear others, in their own causes, or in such wherein they were interested; either by relation of kindred, tenure, service, dependance, or application.

AND although in cases of false judgment, the law, even as then used, provided a remedy, by writ of false judgment, before the king or his chief justice; and in case the judgment was found to be such, in the county court, all the suitors were considerably amerced; which also continued long after in use with some severity; yet this proved but an INEFFECTUAL remedy for those mischiefs.

THEREFORE the king took another and a more effectual course. For in the twenty-second year of his reign (*p*), by advice of his parliament held at Northampton, HE INSTITUTED JUSTICES ITINERANT (*q*); dividing the Kingdom into six circuits, and to every circuit allotting three judges, knowing or experienced in the laws of the realm (*r*). These justices with their several circuits are declared by Hoveden, *sub eodem anno*; i. e. 22. H. 2. viz.

" 1. HUGO CRESSY, Walterus filius Roberti, & Robertus  
" Maunsel, for Norfolk, Suffolk, Cambridge, Hunting-  
" don, Bedford, Buckingham, Essex, and Hartford coun-  
" ties.

" 2. HUGO DE GUNDEVILLA, W. filius Radulphi, & W.

(*p*) A. D. 1176.

(*q*) In the Black Book in the exchequer, cap. 8. they are called "justiciarii deambulantes" and "perlustrantes."

(*r*) Blac. Com. 4v. 422. Speed, 467. Janus-Anglorum 108. Pryn. on 4 Inst. 150. cap. 33. Spelm. Glois. verb. Iter.



" Basset, for Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, and Leicester counties.

" 3. ROBERTUS filius Bernardi, Richardus Giffard, & Rogerus filius Ramfrey, for Kent, Surrey, Suffex, Hampshire, Berks, and Oxon counties.

" 4. W. FILIUS Stephani, Bertein de Verdun, & Turstavi filius Simonis, for Hereford, Gloucester, Worcester, and Salop counties.

" 5. RADULPHUS filius Stephani, W. Ruffus, & Gilbertus Pipard, for the counties of Wilts, Dorset, Somerset, Devon, and Cornwall.

" 6. ROBERTUS DE WATTS, Radulphus de Glanvilla, & Robertus Picknot, for the counties of York, Richmond, Lancaster, Copland, Westmoreland, Northumberland, and Cumberland.

" H<sub>1</sub>, (consilio archiepiscoporum, episcoporum, comitum & baronum regni, &c. apud Nottingham existantium) missi sunt per singulos Angliæ comitatus & juraverunt quod cuilibet jus suum conservarent illæ sum." Hoveden, fo. 313. & Mat. Paris, in anno 1176. And that these men were well known in the law, appears by their companion, Radulphus de Glanvilla; who seems to have been the author of the treatise *De Legibus Angliæ*, and was afterwards made *justitiarius Angliæ*.

To those justices was afterwards committed the conu-  
 zance of all civil and criminal pleas happening within  
 their divisions; and likewise pleas of the crown, pleas  
 touching liberties, and the king's rights. And, the better to  
 acquaint

acquaint them with their business, there were certain assizes which were first enacted at Clarendon, and afterwards confirmed at Northampton; they were not much unlike the *capitula itineris* mentioned in our old *Magna Charta*, but are not so perfect, and are set down by Hoveden *ubi supra*, and are too long to be here inserted. I shall only take notice of this one, viz. establishing descents, because I shall hereafter have occasion to use it:—"Si quis obierit francus tenens hæredes ipsius remaneant in talem seisinam qualem pater suus, &c."

BUT besides those courts in eyre, there were two great standing courts, viz. the exchequer and the court of king's bench, *vel curiam coram ipso rege, vel ejus justiciario*. And it was provided by the above-mentioned assize,—“quod justiciæ faciant omnes justicias & rectitudines spectantes ad dominium regis, & ad coronam suam per breve domini regis vel illorum qui in ejus loco erunt de feodo dimidii militis & infra, nisi tam grandis sit querela quod non possit deduci sine domino rege vel talis quam justiciæ ei reponunt pro dubitatione suâ, vel ad illos qui in loco ejus erunt, &c.”

NEITHER do I find any distinct mention of the court of common bench, in the time of this king; though in the time of king John, there is often mention made thereof; and the rolls of that court, of king John's time, are yet extant upon record. *Vide post. sub Richardi primi* [C].

THE

[C] The editor of the third edition of this History subjoined the following note, on the sentence to which the present note refers.—“Notwithstanding what our author here writes, it appears by Glanville and others, that the common pleas was then also in being,

THE limitation of the assize of Novel Disseisin, is by those assizes appointed to be, "à tempore quo dominus rex venit

" in  
 " ing, and *Magna Charta* has only fixed that court to a certain place  
 " which before was moveable and uncertain."

Sir Edward Coke, it is true, strongly contends for the same position.—"For the antiquity of the court of common pleas, they err" (says Sir Edward) "that hold that before the statute of *Magna Charta* there was no court of common pleas, but had his creation  
 " by or after that charter; for the learned know, that in the six-and-  
 " twentieth year of Edward the third, the abbot of B. in a writ  
 " of assize brought before the justices in eire, claimed consuance  
 " and to have writs of assize, and other original writs out of the  
 " king's court by prescription, time out of mind of man, in the  
 " reigns of Saint Edmond, and saint Edward the Confessor, before  
 " the conquest. And on the behalf of the abbot were shewed  
 " divers allowances thereof in former times, in the king's courts,  
 " and that king Henry the First confirmed their usage, and that  
 " they should have consuance of pleas, so that the justices of the  
 " one bench or the other should not intermiddle. And the statute of  
 " *Magna Charta* erecteth no court, but giveth direction for the pro-  
 " per jurisdiction thereof in these words: *Communia placita non*  
 " *sequantur curiam nostram, sed teneantur in aliquo certo loco.* And  
 " properly the statute saith, *non sequantur*, for that the king's-bench  
 " did in those days follow the king *ubicunque fuerit in Angliâ*, and  
 " therefore enacteth that common pleas should be holden in a court  
 " resident in a certain place. In the next chapter of *Magna Charta*,  
 " (made at one and the same time) it is provided, *et ea, quæ per*  
 " *eosdem* (i. *justiciarios et itinerantes*) *propter difficultatem ali-*  
 " *quorum articulorum terminari non possunt, referantur ad justici-*  
 " *arios nostros de banco, et ibi terminentur.* And in the next to  
 " that, *assise de ultimâ præsentatione semper capiantur coram justici-*  
 " *ariis de banco, et ibi terminentur.* Therefore it manifestly  
 " appeareth, that at the making of the statute of *Magna Charta*  
 " there were *justiciarii de banco*, which all men confess to be the  
 " court of common pleas. And therefore that court was not erect-  
 " ed by or after that statute (a)." From the whole of Coke's ob-  
 " servations here and in the preface to his Eighth Report, it seems to  
 " have been his opinion, that the court of common pleas was not only  
 " a distinct court, at the time of making the *Magna Charta* of the 9th  
 " of Henry III. but also existed as such before the conquest. But ac-

(a) Co. Lit. 71. b.

" in Angliam proximam post pacis factam inter ipsum, &  
 " regem filium suum."

THE same king afterwards, in the twenty-fifth year of his reign, divided the limits of his itinerant justices into four circuits or divisions; and to each circuit assigned a greater number of justices; viz.—five at least, which are thus set down in Hoveden, folio 337. viz. (s).

" ANNO

According to Mr. Madox, whose enquiries into the subject were certainly more minute, the origin of the court of common pleas is of a much later date. He so far agrees with Coke, as to admit, that the *Magna Charta* of Henry the Third rather confirmed, than erected, the bank or common pleas; and that such a court was in being several years before the *Magna Charta* of the 17th of king John, though it was then first made stationary. But in other respects Mr. Edward Coke and Mr. Madox differ widely; for the latter thinks, that for some time after the conquest there was one great and supreme judicature called *curia regis*, which he supposes to have been of Norman and not of Anglo-Saxon original, and to have exercised jurisdiction over the common as well as other pleas; that the common pleas and exchequer were gradually separated from the *curia regis*, and became jurisdictions wholly distinct from it; and that the separation of the common pleas began in the reign of the first Richard, or early in the reign of John, and was completed by Henry the Third. See Mad. Hist. Excheq. fol. ed. 63. and the chapter on the division of the king's courts 539. See farther, 3 Blackst. Comment. 5th ed. 37. 4 Inst. 99. Lamb. Archeion. ed. 1635. p. 24. to 34. and the books cited in Fryn on 4 Inst. 52. Harg. note 2. on Co. Lit. 21. b. and see Sullivan Lect. xxxii. and Barrington on Stat. 10. Lord Bacon supposes that the court of common pleas was erected in the reign of Henry the Third (b).

(s) This important ordinance of Henry had a direct tendency to restrain the oppressions of the barons, and to protect the inferior gentry and common people in their property. Hoveden,

590. These justices were either prelates or considerable nobility; and besides carrying the authority of the king's commission, were able, by the dignity of their own characters, to give weight

(b) Vol. ii. 378,



" ANNO 1179. 25 H. 2. Magno concilio celebrato apud  
 " Windeshores, communi consilio archiepiscoporum comi-  
 " tum & baronum & coram rege filio suo, rex divisit An-  
 " gliam in quatuor partes, & unicuique partium præfecit  
 " viros sapientes ad faciendum justitiam in terra sua in hunc  
 " modum.

" 1. RICARDUS episcopus Winton, Ricardus thesaura-  
 " rius regis, Nicholaus filius Turolti, Thomas Basslet &  
 " Robertus de Whitefield, for the counties of Southampton,  
 " Wilts, Gloucester, Somerset, Devon, Cornwall, Berks,  
 " and Oxon.

" 2. GALFRIDUS Eliensis episcopus, Nicholaus capellanus  
 " regis, Gilbertus Pipard, Reginald de Wisebeck capellanus  
 " regis, & Gaulfridus Hofce, for the counties of Cambridge,  
 " Huntingdon, Northampton, Leicester, Warwick, Win-  
 " chester, Hereford, Stafford, and Salop.

" 3. JOHANNES episcopus Norwicensis, Hugo Murdac  
 " clericus regis, Michael Bellet, Ricardus de le Pec, &  
 " Radulphus Brito, for Norfolk, Suffolk, Essex, Hartford,  
 " Middlesex, Kent, Surrey, Suffex, Bucks, and Bedford.

" 4. GALFRIDUS DE LUCI, Johannes Comyn, Hugo de  
 " Gaerst, Radulphus de Glanvilla, W. de Bendings, Alanus  
 " de Furnellis, for the counties of Nottingham, Derby,  
 " York, Northumberland, Westmorland, Cumberland, and  
 " Lancaster.

and credit to the laws. The  
 honour of bringing this wise in-  
 stitution to a settled state, is due  
 to Henry II. Yet there is suffi-

cient evidence, that courts were  
 held, occasionally at least, by  
 itinerant judges in more antient  
 times. Madox Excheq. 86. seq.

" *Isti sunt iusticiæ in curia regis constituti ad audiendum  
" clamores populi.*"

THIS prince did these three notable things, viz.

FIRST, by this means he improved and perfected the laws of England, and doubtless transferred over many of the English laws into Normandy; which, as before is observed, caused that great suitableness between their laws and ours. So that the similitude did arise, much more by a CONFORMATION of their laws to those of England, than by any conformation of the English laws to theirs; especially in the reigns of king Henry II. and his two sons, king Richard, and king John, both of whom were also dukes of Normandy.

SECONDLY, he checked the pride and insolence of the pope and the clergy, by those constitutions made in a parliament at Clarendon, whereby he restrained the exorbitant power of the ecclesiastics, and the exemption they claimed from secular jurisdiction. And,

THIRDLY, he subdued and conquered Ireland, and added it to the crown of England; which conquest was begun by Richard earl of Stigule, or Strongbow, 14 H. 2. but was perfected by the king himself, in the seventeenth year of his reign; and, for the greater solemnity of the business, was ratified by the FEALTIES of the bishops and nobles of Ireland, and by a bull of confirmation from pope Alexander; who was willing to interest himself in that business, to ingratiate himself with the king, and to gain a pretence for that ARROGANT USURPATION, of disposing of temporal dominions.

dominions. *Vide* Hoveden, *anno* 14 *H.* 2. and the Ninth Chapter of this History (1).

RICHARD I. eldest son of king Henry II. succeeded his father. I have seen little of record, touching the juridical proceedings, either of him or his said father, other than what occurs in the PIPE-ROLLS in the exchequer; which both in the time of Henry II. Richard I. and king John, and all the succeeding kings, are fairly preserved. And the best remembrances that we have of this king's reign in relation to the law, are what Roger Hoveden's Annals have delivered down to us, viz.

(1) To the "three notable things" which sir Matthew Hale has thought proper to notice, it may not be improper to add, that Henry introduced and established the grand assize, or trial by a special kind of jury, in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. *Blac. Com.* 4 v. 422. All advances towards reason and good sense are slow and gradual.--Henry, though sensible of the great absurdity attending the trial by duel or battle, did not venture to abolish it: he only admitted either of the parties to challenge a trial by an assize or a jury of twelve freeholders. *Glanv. lib.* 2. cap. 7.—This latter method of trial seems to have been very antient in England, and most probably was fixed by the laws of Alfred: but the barbarous and violent genius of the age had of late

given more credit to the trial by battle, which had become the general method of deciding all important controversies. It was never abolished by law, in England: and there is an instance of it so late as the reign of Elizabeth. *Vide* Dyer's Rep. fo. 301. pl. 40. But the institution revived by this king, being found more reasonable and more suitable to a civilized people, gradually prevailed over it. To the reign of Henry II. must also be referred the introduction of escuage, or pecuniary commutation for personal military service, which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land tax of later times. *Blac. Com.* 4 v. 423. See Madox, 435, 436, 437, 438. Tyrrel, vol. ii. 466. from the records.

FIRST,

FIRST, he instituted a body of naval laws in his return from the Holy Land, in the island of Oleron, which are yet extant, with some additions. *De quibus vide* Mr. Selden's *Mare Clausum*, lib. 2. cap. 24. I suppose they are the same which are attributed to him by Matt.-Paris, anno 1196. And he constituted justices to put them in execution (\*).

SECONDLY, he observed the same method of distributing justice as his father had begun, by justices itinerant *per singulos Angliæ comitatus*; to whom he delivered two kinds of extracts or articles of inquiry, viz. *capitula coronæ*, much reformed and augmented from what they were before, and *capitula de Judæis*. The whole may be read in Hoveden, fo. 423. *sub anno* 5 R. 1. and by those articles it appears, that at that time there was a settled court for the common pleas, as well as for the king's bench. Though it seems that pleas of LAND were then INDIFFERENTLY held in either; as appears by the first and second articles thereof, where we have,—“*placita per breve domini regis, vel per breve capitalis justitiæ, vel à capitali curiâ regis coram eis (justitiis) missa.*” the former whereof seems to

(\*) The laws of Oleron concerning naval affairs, are the only specimen of the legislative capacity of this brave and magnanimous prince. They were made at the isle of Oleron, off the coast of France, where his fleet rendezvoused in their passage to the Holy Land. These laws were designed for the keeping of order, and for the determination of controversies abroad; and they were framed with such wisdom, that they have been adopted by other nations as

well as England. “I think,” says Dr. Sullivan, “to this time we may, with probability enough, refer the origin of the admiralty jurisdiction.” Sulliv. Lect. 331. Blac. Com. 4 v. 423. But see Dr. Henry's Hist. 3 v. 533.—These laws, which are forty-seven in number, are evidently very antient, and no less prudent, humane and just. Many of them, from a change of manners and circumstances, have been long obsolete.

be



be the common pleas, which held pleas by original writ, which writ was under the king's *teste* when he was in England. But when he was beyond the seas, it was under the *teste* of the *justiciarius Angliæ*, as the *custos regni* in the king's absence (v).

THE power which the justices itinerant had to hold pleas in writs of right, or the grand assize, was sometimes limited—as here by the *articuli coronæ* under Henry II.—to half a knight's fee, or under. For here, in these articles it is, “de magnis assisis quæ sunt de centum solidis & infra.” But in the next commissions, instructions, or *capitula coronæ*, it is, “de magnis assisis usque ad decem libratas terræ & infra.”

IN his eighth year, he established a common rule for weights and measures throughout England, called *assisa de mensuris*; wherein we find the measure of woollen cloths was then the same with that of *Magna Charta*, 9 H. 3. viz. “de duobus ulnis infra lissuras (w).”

IN the year before his death, the like justices errant went through many counties of England, to whom articles, or *capitula placitorum coronæ*, not much unlike the former, were delivered. *Vide Hoveden, sub anno 1198. fo. 445.*

AND in the same year he issued commissions in the Trent, Hugh de Neville being chief justice; and to those were

(v) *Vide* note [C] on this chapter.

(w) He established by law one weight and measure throughout his kingdom. *Mat. Paris*, 109. 134. *Trivet*, 127. *Ann. Waverl.*

165. *Hoved.* 774. An useful institution, which the mercenary disposition and necessities of his successor engaged him to dispense with for money.

also delivered articles of inquiry, commonly called *assise de foresta*, which may be read at large in Hoveden, *sub eodem anno*. These gave great discontent to the kingdom, for both the laws of the forest and their execution were rigorous and grievous (\*).

KING John succeeded his said brother, both in the kingdom of England, and duchy of Normandy. The evidence that we have, touching the progress of the laws of his time, are principally three, viz. First, his charters of liberties. Secondly, the records of pleadings and proceedings in his courts. Thirdly, the course he took for settling the English laws in Ireland.

1. TOUCHING the first of these, his charters of the liberties of England, and of the forest, were hardly and with difficulty gained by his baronage, at Stanes, *anno Dom. 1215*. The collection of the former was, as Matt. Paris tells us, upon the view of the charter or law of king Henry I. which he says, contained “*quasdam libertates & leges à rege Edwardo Sancto, ecclesiæ & magnatibus concessas, exceptis quibusdam libertatibus quas idem rex de suo adjecit;*” and that thereupon the baronage fell into a resolution to have

(\*) Mr. Justice Blackstone, speaking of Richard I. says he was “a sportsman as well as a soldier, and therefore enforced the forest laws with some rigor, which occasioned many discontents among his people: though (according to Matthew Paris) he REPEALED the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted

“on such as transgressed in hunting; probably finding that their severity prevented prosecutions.”—Blac. Com. 4 v. 423.—Mr. Hume says, that Richard RENEWED the severe laws against transgressors in his forests, whom he punished by castration, and putting out their eyes, as in the reign of his great-grandfather. Hist. Eng. 2 v. oct. 38.

those laws granted by king John. But as it is certain, that the laws added by king Henry I. to those of the Confessor, were many more, and much differing from his; so the laws contained in the Great Charter of king John, differed much from those of king Henry I. Neither are we to think, that the charter of king John contained ALL the laws of England; but only, or principally, such as were of A MORE COMPREHENSIVE NATURE, and concerned the common rights and liberties of the church, baronage, and commonalty; which were of the greatest moment, and had been most invaded by king John's father and brother [D].

## THE

[D] In the time of John, the rigours of the feudal system and the forest laws were so warmly maintained, that they occasioned many insurrections. At length, however, the confederated barons and the king agreed on a conference, which was appointed to be held at Runnemede, between Windsor and Staines; a place which has ever since been extremely celebrated on account of this great event. The two parties encamped apart, like open enemies; and after a debate of a few days, the king, with a facility which was somewhat suspicious, signed and sealed the charter which was required of him. The vices, the follies, and the losses of John, not only constrained and encouraged his subjects to demand, but enabled them to obtain, this great palladium of English liberty. This famous *capitularium*, commonly called the Great Charter, either granted or secured very important liberties and privileges to every order of men in the kingdom.

It confirmed many liberties of the Church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries, and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights; it established the testamentary power of the subject over part of his personal

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THE Lesser Charter, or *de Foresta*, was to reform the excesses and encroachments which had been made, especially in

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the

sonal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern; it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice; besides prohibiting all demurs or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits: it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's tourn, and court leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the Great Charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land (a). See Blackstone's tract, which is an excellent edition of the Great Charter, with an introductory historical discourse. To insure the observance of the Great Charter, John allowed the barons to chuse five-and-twenty members from their own body, as conservators of the public liberties. If any complaint was made of a violation of the charter, any four of these barons might admonish the king to redress the grievance; and if satisfaction was not obtained, they could assemble the whole council of twenty-five; who, in conjunction with the great council, were empowered to compel him. All men throughout the kingdom were bound to swear obedience to the five-and-twenty barons; and the

(a) Blac. Com. 4 v. 425.

freeholders



the time of Richard I. and Henry II. who had made new afforestations, and much extended the rigour of the forest laws. And both these charters do, in substance, agree with that *Magna Charta, et de Forestâ*, granted and confirmed 9 Hen. 3.—I shall not need to recite them, or to make any collections or inferences from them. They are both extant in the Red Book of the exchequer, and in Matt. Paris, *sub anno* 1215. The record and the historian do *verbatim* agree.

As to the second evidence we have of the progress of the laws in king John's time; they are the records of pleadings and proceedings which are still extant. But although this king endeavoured to bring the law, and the pleadings and proceedings thereof, to some better order than he found it, yet for saving his profits thereof he was very studious; and for the better reduction of it into order and method, we find frequently, in the records of his time, fines imposed *pro stultiloquio*; which were no other than mulcts imposed by the court for barbarous and disorderly pleading:

freeholders of each county were to chuse twelve knights, who were to make report of such evil customs as required redress, conformable to the tenor of the Great Charter (*d*).

Those men were, by this convention, really invested with the sovereignty of the kingdom; were rendered co-ordinate with the king, or rather superior to him, in the exercise of the executive power; and as there was no circumstance of government, which, either directly or indirectly, might not bear a relation to the security or observance of the Great Charter, there could scarce occur any incident in which they might not lawfully interpose their authority (*e*). HUME.

(*d*) Mat. Paris, 181. This seems a certain proof that the house of commons was not then in being; otherwise the knights and burgesses from the several counties could have

given in to the lords a list of the grievances, without any new election.

(*e*) Dr. Henry's Hist. 3 v. 132, 369 to 385.

from

from whence afterwards that common fine arose *pro pulchre placitando*, which was indeed no other than a fine for want of it. And yet, for all this, the proceedings in his courts were rude, imperfect, and defective, to what they were in the ensuing times of Edward I. &c. But some few observables I shall take notice of, upon the perusal of the judicial records of the time of king John, viz.

FIRST, that the courts of king's bench and common pleas were THEN DISTINCT COURTS, and distinctly held from the beginning to the end of king John's reign (y).

SECONDLY, that as yet, neither one, nor both, of those courts dispatched the business of the kingdom; but a great part thereof was dispatched by the justices itinerant, which were sometimes in use, but not without their intermissions. And much of the publick business was dispatched in the county courts, and in other inferior courts. And so it continued, though with a gradual decrease, till the end of king Edward I. and for some time after. Hence it was, that in those elder times, the profits of those county courts arose, for which the sheriff answered in his farm, *de proficuis comitatûs*. Also fines were levied there, and post fines, and fines *pro licentiâ concordandi*, and great fines there answered. Fines *pro inquisitionibus habendi*, fines for misdemeanors, though called amerciaments, arose to great sums, as will appear to any who shall peruse the ancient viscountiels.

BUT, as I said before, the business of inferior courts grew gradually less and less; consequently their profits and bu-

(y) Vide note [C] on this chapter.

business of any moment came to the great courts, where they were dispatched with greater justice and equality. Besides, the greater courts, observing what partiality and brokerage was used in the inferior courts, gave a pretty quick ear to writs of false judgment; which was the appeal the law allowed from erroneous judgments in the county courts (z). And this, by degrees, wasted the credit and business of those inferior courts.

THIRDLY, that the distinction between the king's bench and common bench, as to the point of *communia placita*, was not YET, nor for some time after, settled. Hence it is, that frequently in the time of king John, we shall find that common pleas were held in *B. R.*—Yea, in Mich. & Hill. 13 *Johannis*, a fine was levied *coram ipso rege*, between Gilbert Fitz Roger and Helwise his wife, plaintiffs, and Robert Barpyard, tenant of certain lands in Kirby, &c (a).

AND again; whereas there was frequently a liberty granted anciently by the kings of England, and allowed, "*quod non implacitetur nisi coram rege*," I find *inter placita de diversis Terminis secundo Johannis*, that upon a suit between Henry de Rochala and the abbot of Leicester, before the justices *de banco*, the abbot pleaded the charter of king Richard I. "*quod idem abbas pro nullo respondeat nisi coram ipso rege vel capitali justituario suo*." And it is ruled against the abbot, "*quia omnia placita quæ coram justic. de banco te-*

(z) A writ of false judgment lies whenever a false judgment is given in an inferior court not of record. F. N. B. 17. Moor

(a) See note [C] on this chapter. Barr. Obs. on Stat. 10, 11. and Sulliv. Lect. 312. seq.

"*nenitur, coram domino regi vel ejus capitali justituario teneri intelliguntur.*" But this point was afterwards settled by the statute of *Magna Charta* (b), "*quod communia placita non sequantur curiam nostram.*"

FOURTHLY, that the four Terms were then held according as was used in after-times, with little variance, and had the same denominations they still retain.

FIFTHLY, that there were oftentimes considerable sums of money, or horses, or other things, given to obtain justice. Sometimes it is said to be *pro habenda inquisitione, ut supra*. And *inter placita incerti temporis regis Johannis*, the men of Yarmouth against the men of Hastings and Winchester, "*afferunt domino regi tres palfridos & sex asturias narenses ad inquisitionem habendam per legales, &c.*" And frequently the same was done, and often accounted for in the PIPE-ROLLS under the name of OBLATA. To remedy this abuse, was the provision made in king John's and king Henry the Third's charters, "*NULLI VENDEMUS JUSTITIAM VEL RECTUM (c).*" But yet fines upon originals, being certain, have continued to this day, notwithstanding that provision; but those enormous *oblata* before mentioned, are thereby remedied and taken away [E].

S 4

SIXTHLY,

(b) Cap. 11. (c) Barring: on Stat. 22. Mag. Car. cap. 29.

[E] Fines, amerciaments, and OBLATAS, as they were called, were a considerable branch of the royal power and revenue. The ancient records of the exchequer, which are still preserved, give surprising accounts of the numerous fines and amerciaments levied in those days (a), and of the strange inventions fallen upon to exact money from the subject. It appears, that the old kings of England put themselves entirely on the footing of the barbarous

(a) Madox's Hist. Exch. 272.



SIXTHLY, that in all the time of king John, the purgation *per ignem & aquam*, or the trial by ORDEAL, continued:

28

eastern princes, whom no man must approach without a present, who sell all their good offices, and intrude themselves into every business, that they may have a pretence of extorting money. Even justice was avowedly bought and sold; the king's court itself, though the supreme judicature of the kingdom, was open to none that brought not large presents to the king; the bribes given for the expedition, delay (*b*), suspension, and, doubtless, for the perversion of justice, were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert, as an article in their records, that the county of Norfolk paid a sum, that they might be fairly dealt with (*c*); the borough of Yarmouth, that the king's charters, which they have for their liberties, might not be violated (*d*); Richard, son of Gilbert, for the king's helping him to recover his debt from the Jews (*e*); Serlo, son of Terlavaston, that he might be permitted to make his defence, in case he was accused of a certain homicide (*f*); Walter de Burten for free law, if accused of wounding another (*g*); Robert de Effart for having an inquest to find whether Roger the butcher, and Wace and Humphry, accused him of robbery and theft out of envy and ill-will or not (*h*); William Buhust for having an inquest to find whether he was accused of the death of one Godwin out of ill-will or for just cause (*i*). These few instances are selected from a great number of the like kind, which Madox selected from a still greater number, preserved in the antient rolls of the exchequer (*k*).

Sometimes the party litigant proffered the king a certain portion, a half, a third, a fourth; payable out of the debts, which he, as the executor of justice, should assist him in recovering (*l*). Theophania de Westland agreed to pay the half of 212 marks, that she might recover that sum against James de Fugleston (*m*); Solomon the Jew engaged to pay one mark out of every seven that he should recover against Hugh de la Hufe (*n*); Nicholas Morrel promised to

(*b*) Id. 274. 309.

(*c*) Id. 295.

(*d*) Id. *ibid*.

(*e*) Madox's Hist. Excheq. 296.

He paid two hundred marks, a great sum in those days.

(*f*) Id. 296.

(*g*) Id. *ibid*.

(*h*) Id. 298.

(*i*) Id. 302.

(*k*) Chap. 12.

(*l*) Id. 311.

(*m*) Id. *ibid*.

(*n*) Id. 79. 312.

as appears by frequent entries upon the rolls (*d*). But it seems to have ended with this king, for I do not find it in use in any time after. Perchance the barbarousness of the trial, and persuasions of the clergy, prevailed at length to antiquate it, for many canons had been made against it [F].

## SEVENTHLY,

pay sixty pound, that the earl of Flanders might be distrained to pay him three hundred and forty-three pound, which the earl had taken from him; and this was to be paid out of the first money that Nicholas should recover of the earl (*e*). There were no profits so small as to be below the king's attention—his protection and good offices, of every kind, were bought and sold.

(*d*) Barring. on Stat. 296. Blac. Com. 4 v. 425.

[F] Our ancestors, as an infallible method of discovering truth, and of guarding against deception, appealed to heaven, and referred every point in dispute, to be determined, as they imagined, by the decisions of unerring wisdom and impartial justice. The person accused, in order to prove his innocence, submitted, in some cases, to trial, by plunging his arm in boiling water; by lifting a red-hot iron with his naked hand; by walking barefoot over burning ploughshares; or by other experiments equally perilous and formidable. On other occasions, he challenged his accuser to fight him in single combat. All these various forms of trial were conducted with many devout ceremonies; the ministers of religion were employed, the Almighty was called upon to interpose, for the manifestation of guilt, and for the protection of innocence; and whoever escaped unhurt, or came off victorious, was pronounced to be acquitted by the judgment of God (*a*).

Among all the whimsical and absurd institutions which owe their existence to the weakness of human reason, this, which submitted questions that affected the property, the reputation, and the lives of men, to the determination of chance, or of bodily strength and address, appears to be the most extravagant and preposterous. There were circumstances, however, which led the nations of Europe to consider this equivocal mode of deciding any point in contest as a direct appeal to heaven, and a certain method of discovering its will.

(*e*) Id. 312.

Dei. Antiquit. Italic. vol. iii.

(*a*) Murat. Dissertatio de judiciis p. 612.

SEVENTHLY, in this king's time, the descent of socage as well as knight's service lands to the ELDEST son, prevailed in

As men are unable to comprehend the manner in which the Almighty carries on the government of the universe, by equal, fixed, and general laws, they are apt to imagine, that in every case which their passions or interest render important in their own eyes, the supreme Ruler of all ought visibly to display his power, in vindicating innocence and punishing vice. It requires no inconsiderable degree of science and philosophy to correct this popular error. But the sentiments prevalent in Europe during the dark ages, instead of correcting, strengthened it. Religion, for several centuries, consisted chiefly in believing the legendary history of those saints whose names crowd and disgrace the Romish calendar. The fabulous tales, concerning their miracles, had been declared authentic by the bulls of popes, and the decrees of councils; they made the great subject of the instructions which the clergy offered to the people, and were received by them with implicit credulity and admiration.

By these, men were accustomed to believe that the established laws of nature might be violated on the most frivolous occasions, and were taught to look rather for particular and extraordinary acts of power under the divine administration, than to contemplate the regular progress and execution of a general plan. One superstition prepared the way for another; and whoever believed that the supreme Being had interposed miraculously on those trivial occasions mentioned in legends, could not but expect his intervention in matters of greater importance, when solemnly referred to his decision (6). The canon law very early declared against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "cum sit contra præceptum Domini, non tentabis Dominum Deum tuum." Decret. part 2. caus. 2. qu. 5. dist. 7. Decretal. lib. 3. tit. 50. c. 9. and Spelm. Gloss. 435. Upon this authority, though the canons themselves were of no validity in England, it was thought proper to abolish this mode of trial entirely in our courts of justice, by an act of parliament in 3 Hen. III. according to sir Edward Coke, 9 Rep. 32. or rather by an order of the king in council. 1 Rym. Fœd. 228. Spelm. Gloss. 326. 2 Pryn. Rec. Append. 20. Seld. Eadm. fol. 48. A faint mark of improvement in the age.

The most common kinds of ordeal used in England, were—the judicial combat; the ordeal of the cross; the ordeal of the corded; the ordeal of cold water; the ordeal of hot water; the ordeal of

(6) Robert. Cha. V. 17. oct. 59. Blac. Com. l. 4. c. 27.

in all places (e); unless there was a special custom, that the lands were partible *inter masculos*. And therefore, Mich. secundo Johannis, in a *rationabili parte bonorum*, by Gilbert Beville against William Beville his elder brother, for lands in Gunthorpe, the defendant pleaded, "quod nunquam partita vel partibilia fuere;" and because the defendant could not prove it, judgment was given for the demandant. And by degrees it prevailed so, that whereas at this time the averment came on the part of the heir at law, that the land "*nunquam partita vel partibilis extetit*;" in a little time after the averment was turned on the other hand, viz. that though the land was socage, yet unless he did aver and prove that it was *PARTITA ET PARTIBILIS*, he failed in his demand.

THIRDLY, the third instance of the progress of king John's reign, in relation to the common law, was his settling the same in Ireland, which he made his more immediate and particular business. But hereof we shall add a particular chapter by itself (f), when we have shewn you what proceedings and progress was made therein in the time of Edward I. The many and great troubles that fell upon king John and the whole kingdom, especially towards the latter end of his reign, did much hinder the good effect of settling the laws of England, and consequently the peace thereof; which might have been bottomed, especially upon the Great

(e) Vide post. cap. 11. passim.

(f) Cap. 9.

hot iron. The modes in which these appeals to heaven were performed, are noticed by Dr. Henry in the second volume of his History of England (c). If we suppose that few or none escaped conviction, who thus exposed themselves, we shall be very much mistaken. The whole was a gross imposition on the credulity of mankind.

(c) Page 303 to 308.



charter. But this unfortunate prince and the kingdom were so entangled with intestine wars, and with the invasion of the French, who assisted the English barons against their king, and by the advantages and usurpations that the pope and the clergy made by those distempers, that all ended in a confusion with the king's death (*g*).

I COME therefore to the long and troublesome reign of Henry III. who was about nine years old at his father's death; he being born in *festo sancti Remigii* 1207 (*b*), and king John died in *festo sancti Lucae* 1216. The young king was crowned the 28th of October (*i*), being then in the tenth year of his age, and was under the tutelage of William earl-marshal (*k*).

THE nobility were quick and earnest, notwithstanding his minority, to have the liberties and laws of the kingdom confirmed. Preparatory thereto, in the year 1223, writs issued to the several counties to enquire, by twelve good and lawful knights, "*quæ fuerunt libertates in Angliâ tempore regni Henrici avi sui*," returnable *quindena Pasche*.

(*g*) It should not be forgotten, that the first traces which remain of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John, though omitted in that of Henry III. John, in the ninth year of his reign, first gave by charter to the city of London, the right of electing annually a mayor, out of its own body, an office which, till then, had been held for life.

(*b*) Henry III. was born on the first of October 1207.

(*i*) He was crowned on the

28th of October 1216. M. Paris, 200. Hist. Croyl. Cont. 474. W. Heming. 562. Trivet, 168.

(*k*) The earl of Pembroke;—who, at the time of John's death was marshal of England. By his office he was at the head of the armies, and consequently, during a state of civil wars and convulsions, at the head of the state. It happened fortunately for the young monarch, and for the nation, that the power could not have been intrusted into more able and more faithful hands.

What

What success those inquisitions had, or what returns were made thereof, appears not. But in the year following, the young king standing in need of a supply of money from the clergy and laity, none would be granted, unless the liberties of the kingdom were confirmed, as they were expressed and contained in the two charters of king John; which the king accordingly granted in his parliament at Westminster, and they were accordingly proclaimed, "*ita quod chartæ utrorumque regum in nulla inveniatur diffimiles.*" MAT. PARIS, *anno* 1224.

In the year 1227, the king holding his parliament at Oxford, and being now of full age, by ill advice, causes the two charters he had formerly granted to be cancelled; "*hanc occasionem prætendens, quod chartæ illæ concessæ fuerunt & libertates scriptæ & signatæ dum ipse erat sub custodia, nec sui corporis aut sigilli aliquam potestatem habuit, unde viribus carere debuit, &c.*" Which fact occasioned a great disturbance in the kingdom. This inconsistency in the king was in truth THE FOUNDATION OF ALL HIS FUTURE TROUBLES, and yet was ineffectual to his end and purpose; for those charters were NOT avoidable for the king's nonage; and if there could have been any such pretence, that alone would NOT avoid them, for they were LAWS CONFIRMED IN PARLIAMENT.

BUT the Great Charter, and the Charter of the Forest, did not expire so; for, in 1253, they were again sealed and published. And because, after the battle of Evesham, the king had wholly subdued the barons, and thereby a jealousy might grow, that he again meant to infringe it, in the parliament of Marlbridge (1) they were again con-

(1) Cap. 5.

firmed. And thus we have the great settlement of the laws and liberties of the kingdom established in this king's time. The charters themselves are not every word the same with those of king John, but they differ very little in substance.

THIS Great Charter, and *Charta de Foresta*, was the great basis upon which this settlement of the English laws stood, in the time of this king and his son. There were also some additional laws of this king yet extant, which much polished the common law, viz. the statutes of Merton and Marlbridge, and some others.

WE have likewise two other PRINCIPAL MONUMENTS of the great advance and perfection that the English laws attained to under this king, viz. the tractate of Bracton, and those records of pleas, as well in both benches as before the justices itinerant, the records whereof are still extant.

TOUCHING the former, viz. Bracton's tractate, it yields us a great evidence of the growth of the laws between the times of Henry II. and Henry III. If we do but compare Glanville's book with that of Bracton, we shall see A VERY GREAT ADVANCE OF THE LAW, in the writings of the latter, over what they are in Glanville. It will be needless to instance particulars. Some of the writs and processes do indeed in substance agree, but the proceedings are much more regular and settled, as they are in Bracton, above what they are in Glanville. The book itself in the beginning seems to borrow its method from the civil law. But the greatest part of the substance is, either of the course of proceedings in the law known to the author; or of resolutions and decisions in the courts of king's-bench and common-bench, and  
before

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before justices itinerant; for now the inferior courts began to be of little use or esteem (*m*).

As to the judicial records of the time of this king, they were grown to a much greater degree of perfection, and the pleadings more orderly; many of which are extant. But the great troubles, and the civil wars that happened in his time, gave a great interruption to the legal proceedings of courts. They had a particular commission and judicatory for matters happening in time of war, styled *placita de tempore turbationis*, wherein are many excellent things. They were made principally about the battle of Evesham, and after it. And for settling of the differences of this kingdom, was the *Dictum* or *Edictum de Kenelworth* (*n*) made, which is printed in the old *Magna Charta*.

WE have little extant of resolutions in this king's time, but what are either remembered by Bracton, or some few broken and scattered Reports collected by Fitzherbert in his Abridgment. There are also some few sums, or constitutions, relative to the law; which though possibly not acts of parliament, yet have obtained in use as such. As,—“*de diffractione scaccarii, statutum panis & cerevisiæ, dies communes in banco, statutum Hiberniæ, stat. de scaccario, judicium collistrigrii*,” and others (*o*).

WE come now to the time of Edward I. who is well styled our ENGLISH JUSTINIAN; for in his time the law, *quasi per saltum*, obtained a very great perfection.

(*m*) It is worthy of remembrance, that towards the end of the reign of this monarch, we find the first record of any writ

for summoning knights, citizens, and burghesses to parliament.

(*n*) Vide cap. 1.

(*o*) Barr. on Stat. 39. 46.

THE



THE pleadings are **SHORT** indeed, but excellently good and **PERSPICUOUS**. And although for some time, some of those imperfections and ancient inconvenient rules obtained; as for instance, in point of descents; where the **MIDDLE** brother held of the eldest, and dying without issue, the lands descended to the **YOUNGEST**; upon that old rule in the time of Henry II. "*nemo potest esse dominus & hæres,*" mentioned in Glanville; at least if he had once received homage, 13 E. 1. Fitz. Avowry 235. ; yet the laws did never, in any one age, receive so great and sudden an advancement. Nay, I think I may safely say, all the ages since his time have **NOT** done so much, in reference to the orderly settling and establishing of the distributive justice of this kingdom, as he did within a short compass of the thirty-five years of his reign; especially about the first thirteen years thereof (p).

**INDEED**, many penal statutes and provisions, in relation to the peace and good government of the kingdom, have been since made. But as touching the common administration of justice between party and party, and accommodating of the rules, and of the methods and orders of proceeding, **HE DID THE MOST**, at least of any king since William I.—and left the same, as a fixed and stable rule and order of proceeding, very little differing from that which we now hold and practise; especially as to the substance and principal contexture thereof.

It would be the business of a volume to set down all the particulars, and therefore I shall only give some short observations touching the same (q).

(p) Blac. Com. 4 v. 425.

(q) Mr. Just. Blackstone has concisely, but elegantly and sufficiently enumerated the prin-

cipal part of these regulations, in the fourth volume of his Commentaries, from page 425 to 427. oct.

FIRST, he perfectly settled the Great Charter, and *Charta de Foresta*, not only by a practice consonant to them, in the distribution of law and right;—but also by that solemn act passed 25 E. 1. and stiled *confirmationes cartarum*.

SECONDLY, he established and distributed the several jurisdictions of courts within their proper bounds. And because this head has several branches, I shall subdivide the same, viz.

1. He checked the incroachments and insolences of the pope and the clergy, by the statute of Carlisle.

2. He declared the limits and bounds of the ecclesiastical jurisdiction, by the statutes of *circumspecte agatis* & *articuli cleri*. For note, though this latter statute was not published till Edward II. yet it was COMPILED in the beginning of Edward I.

3. He established the limits of the court of common pleas; perfectly performing the direction of *Magna Charta*, "*quod communia placita NON SEQUANTUR curia nostra*," in relation to B. R.; and in express terms extending it to the court of exchequer, by the statute of *articuli super chartas*, cap. 4. It is true, upon my first reading of the *placita de banco* of Edward the First, I found very many appeals of death, of rape, and of robbery therein; and therefore I doubted, whether the same were not held, at least by writ, in the common pleas court: but, upon better inquiry, I found many of the records before justices itinerant were entered, or filled up, among the records of the common pleas; which might occasion that mistake.

4. HE established the extent of the jurisdiction of the steward and marshal. *Vide articuli super chartas*, cap. 3. And,

5. HE also settled the bounds of inferior courts, not only of counties, hundreds, and courts baron;—which he kept within their proper and narrow bounds, for the reasons given before; and so gradually the common justice of the kingdom came to be administered by men knowing in the laws, and conversant in the great courts of *B. R.* and *C. B.* and before justices itinerant;—but also, by that excellent statute of Westminster 1. cap. 35. he kept the courts of great men within their limits, under several penalties; wherein ordinarily very great incroachments and oppressions were exercised.

THE third general observation I make is, he did not only explain, but excellently enforced, *Magna Charta*, by the statute *de tallagio non concedendo*, 34 E. 1.

FOURTHLY, he provided against the interruption of the common justice of the kingdom, which had too commonly been affected, by mandates under the great seal or privy seal. This he did by the statute of *articuli super chartas*, cap. 6.—which interruptions, notwithstanding *Magna Charta*, had formerly been frequent in use (r).

(r) Edward enacted a law to this purpose, but it is very doubtful, whether he ever observed it. We are sure that scarce any of his successors did. The multitude of these letters of protection were a ground of complaint by the commons in 3 Edw. II. See

Ryley, 525. This practice is declared illegal by the statute of Northampton, passed in the reign of Edward III. but still continued, like many other abuses. There are instances of it so late as the reign of Elizabeth.

FIFTHLY,

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FIFTHLY, he settled the forms, solemnities, and efficacies of fines; confining them to the common pleas, and to justices itinerant; and appointed the place where they brought the records after their circuits; whereby one common repository might be kept of assurances of lands: which he did by the statute *de modo levandi fines*, 18 E. 1.

SIXTHLY, he settled that great and orderly method, for the safety and preservation of the peace of the kingdom, and suppressing of robberies, by the statute of Winton.

SEVENTHLY, he settled the method of tenures, to prevent multiplicity of penalties, which grew to a great inconvenience; and remedied it by the statute of *quia emptores terrarum*, 18 E. 1.

EIGHTHLY, he settled a speedier way for recovery of debts, not only for merchants and tradesmen, by the statutes of Acton Burnel and *de mercatoribus*, but also for other persons, by granting an execution for a moiety of the lands, by *elegit*.

NINTHLY, he made effectual provision for recovery of advowsons and presentations to churches, which was before infinitely lame and defective, by statute Westminster 2. cap. 1.

TENTHLY, he made that GREAT ALTERATION in estates, from what they were formerly, by statute Westminster 2. cap. 1. whereby estates of fee-simple, CONDITIONAL AT COMMON LAW, were turned into ESTATES-TAIL, not removeable from the issue by the ordinary methods of aliena-



tion (1). Upon this statute, and for the qualifications hereof, are the superstructures built of 4 H. 7. cap. 32. 32 H. 8. and 33 H. 8.

ELEVENTHLY, he introduced quite a new method, both in the laws of Wales, and in the method of their dispensation, by the statute of Rutland (1).

TWELFTHLY, in brief, partly by the learning and experience of his judges, and partly by his own wise interposition, he silently and without noise, abrogated many ill and inconvenient usages, both in his courts of justice, and in the country. He rectified and set in order the method of collecting his revenue in the exchequer, and removed ob-

(1) By this statute Edward ESTABLISHED a new limitation of property, concerning the good policy of which modern times have, however, entertained a very different opinion. Blac. Com. 4 v. 427. Barring. on Stat. 112. The chief obstruction to the execution of justice in those times was the power of the great barons; and Edward was perfectly qualified, by his character and abilities, to keep those tyrants in awe, and to restrain their illegal practices. This salutary purpose was accordingly the great object of his attention; yet he was imprudently led into a measure which tended very much to increase and confirm their exorbitant authority. He passed the statute of Westminster, which by allowing them to entail their estates, made it impracticable to diminish the property of the great families, and of consequence left them every mean of increase and acquisition.

By the words of the statute *de donis*, a perpetuity was created, and the donee was restrained either from alienation or forfeiture. In a short time it was manifest that this restriction was not only inconsistent with the reasons of the common law, but repugnant to every idea of sound policy. The great, however, were unwilling to make any parliamentary alteration in the law, and therefore the judges, in the time of Edward IV. encouraged the finess of a COMMON RECOVERY, in order to bar the entail; the judges conceiving the case of a common recovery not to be within the operation of the statute. Another wound given to these perpetuities was, by the statute 4 H. VII. cap. 24. which made a fine with proclamations a bar to the issue in tail, and so repealed that clause of the statute *de donis*, *quod finis ipso jure sit nullus*. See note [C] on cap. 8.

(1) See post. cap. 9.

solete and illeivable parts thereof out of charge. And by the statutes of Westminster 1. and Westminster 2. Gloucester, and Westminster 3. and of *articuli super chartas*, he did remove ALMOST ALL that was either grievous or impractical, out of the law, and the course of its administration; and substituted such apt, short, pithy, and effectual remedies and provisions, as by the length of time, and the experience had of their convenience, have stood ever since, without any great alteration; and are now as it were incorporated into, and become a part of the common law itself.

UPON the whole matter, it appears, that the very scheme, mould and model of the common law, especially in relation to the administration of common justice between party and party, as it was highly rectified and set in a much better light and order by this king, than his predecessors left it to him; so in a very great measure it has continued the same, in all succeeding ages, to this day (†). So that the mark, or epocha, we are to take for the true stating of the law of England, WHAT IT IS, is to be considered, stated, and estimated, from what it was when this king LEFT it. Before his time, it was in a great measure, rude and unpolished, in comparison of what it was, after his reduction thereof. And on the other side, as it was thus polished and ordered by him, so has it stood hitherto, without any great or considerable alteration; abating some few additions and alterations which succeeding times have made, which for the most part are in the subject matter of the laws themselves,

(†) Blac. Com. 4 v. 427. There cannot be a better proof of the excellence of Edward's constitutions, than that from his time to that of Henry VIII. there happened very few, and those not very considerable alterations in the legal forms of proceedings,

and not so much in the rules, methods, or ways of its administration.

As I before observed some of those many great accessions to the perfection of the law under this king, so I shall now observe some of those boxes or repositories where they may be found; which are of the following kinds, viz.

FIRST, the acts of parliament in the time of this king; which are full of excellent wisdom and perspicuity, yet brevity. But of this, enough before is said.

SECONDLY, the judicial records in the time of this king. I shall not mention those of the chancery, the close-patent and charter-rolls, which yet will very much evidence the learning and judgment of that time: but I shall mention the rolls of judicial proceedings, especially those in the king's-bench and common-pleas, and in the eyres. I have read over many of them, and do generally observe;

1. THAT they are written in an excellent hand.

2. THAT the pleading is VERY SHORT, but VERY CLEAR AND PERSPICUOUS; neither loose or uncertain, nor perplexing the matter either with impropriety, obscurity, or multiplicity of words. They are clearly and orderly digested, effectually representing the business that they intend (*u*).

(*u*) "It is worthy of observation, (says sir Edward Cok.) that in the reigns of Edward the Second, Edward the First, and upwards, the pleadings were plain and sensible, but nothing curious; evermore having chief

respect to the MATTER, and not to forms of words. But even in those days, the forms of the Register of original writs were then punctually observed, and matters in law excellently debated and resolved." 1 Inst. 304. a.

3. THAT

3. THAT the title and the reason of the law upon which they proceed, (which many times is expressly delivered upon the record itself) is perspicuous, clear, and rational. So that their SHORT AND PITHY PLEADINGS AND JUDGMENTS do far better render the sense of the business, and the reasons thereof, than those long, intricate, perplexed, and formal pleadings, that oftentimes, of late, are UNNECESSARILY used.

THIRDLY, the reports of the terms and years of this king's time, a few broken cases whereof are in Fitzherbert's Abridgment. But we have no successive terms or years thereof, but only ancient manuscripts, perchance, not running through the whole time of this king. Yet they are VERY GOOD, but VERY BRIEF. Either the judges then spoke less, or the reporters were not so ready-handed as to take all they said. Hence this brevity makes them the more obscure. But yet in those brief interlocutions between the judge and the pleaders, and in their definitions, there appears A GREAT DEAL OF LEARNING AND JUDGMENT. Some of these reports, though broken, yet the best of their kind, are in Lincoln's-Inn library.

FOURTHLY, the tracts written or collected in the time of this wise and excellent prince : which seem to be of two kinds, viz. such as were only the tractates of private men, and therefore had no greater authority than private collections, yet contain much of the law then in use ; as Fleta, the Mirror, Britton, and Thornton : or else, secondly, they were sums, or abstracts, of some particular parts of the law ; as, *Novæ Narrationes*, Hengham *Magna et Parva*, *Cadit Affisa summa*, *De Bastardia summa* : by all which, compared even with Bracton, there appears a growth



and a perfecting of the law into a greater regularity and order (x).

AND thus much shall serve for the several periods, or growth, of the common law, until the time of Edward I. inclusively. Wherein having been somewhat prolix, I shall be the briefer in what follows; especially seeing that from this time downwards, the books and reports printed, give a full account of the ensuing progress of the law.

(x) The chief advantage which the people of England reaped, and still continue to reap, from the reign of this great prince, was the correction, extension, amendment, and establishment of the laws; which Edward maintained in great vigour, and left much improved to posterity; for the work of wise legislators commonly remain, while the acquisitions of conquerors often perish with them. This merit has justly gained to Edward the appellation of the English JUSTI-

NIAN. Not only the numerous statutes passed in his reign, touch the chief points of jurisprudence, and, according to sir Edward Coke (a), truly deserve the name of establishments, because they were more constant, standing, and durable laws than any made since; but the regular order of his administration gave an opportunity to the common law to refine itself, and brought the judges to a certainty in their determinations, and the lawyers to a precision in their pleadings.

(a) 2 Inst. 156.

## C H A P. VIII.

*A brief continuation of the progress of the laws, from the time of king Edward II. inclusive, down to these times.*

HAVING in the former chapter been somewhat large in discoursing of the progress of the laws, and the incidental additions they received, in the several reigns of king William II. king Henry I. king Stephen, king Henry II. king Richard I. king John, king Henry III. and king Edward I.—I shall now proceed to give a brief account of the progress thereof, in the time of Edward II. and the succeeding reigns, down to these times.

EDWARD II. succeeded his father. Though he was an unfortunate prince, and by reason of the troubles and unevenness of his reign, the very law itself had many interruptions, yet it held its current, in a great measure, according to that frame and state that his father had left it in.

BESIDES the records of judicial proceedings in his time, many whereof are still extant, there were some other things that occurred in his reign, which give us some kind of indication of the state and condition of the law during that reign. As,

FIRST, the statutes made in his time, especially that of 17 E. 2. styled DE PREROGATIVA REGIS; which though it be called a statute, yet for the most part is but a sum, or collection, of certain of the king's prerogatives that were  
known

known law, long before. As for instance, the king's wardship of lands IN CAPITE attracting the wardship of lands held of others; the king's grant of a manor not carrying an advowson appendant unless named; the king's title to the escheat of the lands of the Normans, which was in use from the first defection of Normandy under king John; the king's title to wreck, royal fish, treasure trove, and many others; all of which were ancient prerogatives to the crown (a).

SECONDLY, the reports of the years and terms of this king's reign. These are not printed in any one entire volume, or in any series or order of time; only some BROKEN CASES thereof in Fitzherbert's Abridgment, and in some other books dispersedly. Yet there are many entire copies thereof abroad, very excellently reported; wherein are many resolutions agreeing with those of Edward the First's time. The best copy of these reports that I know now extant, is that in Lincoln's-Inn library, which gives a fair specimen of the learning of the pleaders and judges of that time (b).

## KING

(a) Vide Barrington on Stat. 179. seq.

(b) See the first volume of the Year-Books, edit. 1678. intitled, "Les reports des cases argue & adjudge in le temps del' roy Edward le second. Solonq; les ancient manuscripts ore remanent en les maines de sir Jehan Maynard chevalier, serjeant de la ley & de tres excellent majesty le roy Charles le second."—This is the old book of reports "of the years and terms" of Edward the Second, to which Hale alludes;

and it is probable that these reports were first published in consequence of his recommendation, in the case of Sacheverell and Frogatt, Mich. 23. Car. II. reported in 2 Saund. 367. 1. Vent. 148. 161. 2 Keb. 798. 819. 833. 839. T. Raym. 213. Mr. Seiden, to whom knowledge of this kind was perfectly familiar, says the compiler of these reports was one Richard de Winchedon, who lived in the reign of Edward II.—There is some small variation in the co-

pics

KING EDWARD III. succeeded his father. His reign was long; and UNDER IT THE LAW WAS IMPROVED TO THE GREATEST HEIGHT. The judges and pleaders were very learned, and the pleadings are somewhat more polished than those in the time of Edward I.—Yet they have neither UNCERTAINTY, PROLIXITY, NOR OBSCURITY. They were PLAIN AND SKILFUL; and in the rules of law, especially in relation to real actions, and titles of inheritance, VERY LEARNED AND EXCELLENTLY POLISHED, and exceeded those of the time of Edward I.: so that at the latter end of this king's reign the law seemed to be near its meridian (c).

THE

pies. Seld. Dissert. Flet. 528, 529. Ten volumes of the YEAR-BOOKS, OR OLD REPORTS, beginning with the reign of Edward the Third, and ending with that of Henry the Eighth, were printed by subscription in the year 1679. To these were afterwards added the cases which were determined in the time of Edward the Second, and collected by Serjeant Maynard. This valuable collection was produced from the joint labours of many learned men; of men who were particularly chosen to take notes of all that judicially occurred and was decided. These notes were not only communicated to, but, if they required it, were corrected by, the judges. Plowden, one of the most valuable of our reporters, says, that these books were collected by four able men, especially appointed for the purpose, and who were annually rewarded by the king. See pref. 3. Rep. Dugd. cap. xxiii. Nicholson, iii. 178. Tyrrel, Int. ci. Mr.

Justice Blackstone says they "were taken by the prothonotaries, or chief scribes of the court, at the expence of the crown, and published annually, whence they are known under the denomination of the Year-Books." Com. 1 v. 72. This opinion may be right, but the learned judge has omitted to make mention of the authority which induced him to entertain it. Sir Edward Coke, in the preface to his Third Report, remarks, that "the kings of this realm, that is to say, E. 3. H. 4. H. 5. H. 6. E. 4. R. 3. and H. 7. did select and appoint four discreet and learned professors of law to report the judgments and opinions of the reverend judges:" but takes no notice of their being either "the prothonotaries" or "chief scribes of the court;" or that their reports were "published annually." "Out of these old fields (adds Sir Edward) springs the new corn."

(c) "In the reign of Edward III. pleadings (in the opinion of Sir



THE reports of this king's time run from the beginning to the end of his reign; excepting some few years between the 10th and 17th, and 30th and 33d years of his reign. But those omitted years are extant in many hands, in old manuscripts (d).

THE BOOK OF ASSIZES is a collection of the assizes that happened in the time of Edward III. being, from the beginning to the end, extracted out of the books and assizes of those that attended the assizes in the country (e).

THE justices itinerant continued by intermitting vicissitudes till about the 4th of Edward III. and some till the 10th of Edward III. Their jurisdiction extended to pleas of the crown, or criminal causes, civil suits and pleas of liberties, and *quo warranto*'s. The reports thereof are not printed, but are in many hands in manuscript, both of the times of Edward I. Edward II. and Edward III. full of excellent learning. Some few broken reports of those eyres, especially of Cornwall, Nottingham, Northampton, and Derby, are collected by Fitzherbert in his Abridgment.

AFTER the 10th of Edward III. I do not find any justices *errant ad communia placita*, but only *ad placita foreste*.

(*for* Edward Coke) grew to perfection, both without lameness and curiosity; for then the judges and professors of the law were excellently learned, and then knowledge of the law flourished: the serjeants of the law, &c. drew their own pleadings, and therefore truly said that reverend justice Thirning, in the reign of Henry IV. that in the time of Edward III. the law was in a higher degree than it had been

any time before; for before that time the manner of pleading was but feeble, in comparison of that it was afterwards in the reign of the same king."—1 Inst. 304. b.

(d) Probably they were all printed in Maynard's edition of the Year-Books.

(e) Vide "*Le Livre des Assises*," which is the fifth volume of the Year-Books, ed. 1679.

Other

## COMMON LAW OF ENGLAND. 235

Other things that concerned those justices itinerant were supplied and transacted in the common bench for *communia placita*;—in the king's bench and exchequer for *placita de libertatibus*;—and before justices of assize, *nisi prius*, *oyer* and *terminer*, and gaol delivery, for assizes and pleas of the crown.

AND thus much for the law in the time of Edward III.  
[A].

RICHARD

[A] The old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III. and justices of the peace established instead of the latter. In the reign also of Edward the Third, the parliament “is supposed most probably to have assumed its present form, by a separation of the commons from the lords.” It is remarked by an elegant historian (a), that conquerors, though usually the bane of human kind, proved often, in the feudal times, the most indulgent of sovereigns. They stood most in need of supplies from their people; and not being able to compel them by force to submit to the necessary impositions, they were obliged to make them some compensation, by equitable laws and popular concessions. This remark is in some measure, though imperfectly, justified by the conduct of Edward III. He took no steps of moment without consulting his parliament, and obtaining their approbation, which he afterwards pleaded as a reason for their supporting his measures (b). The parliament therefore rose into greater consideration during his reign, and acquired a more regular authority than in any former times; and even the house of commons, which, during turbulent and factious periods, was naturally oppressed by the greater power of the crown and barons, began to appear of some weight in the constitution.

The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly. One of the most popular laws enacted by any prince, was the statute which passed in the twenty fifth of this reign (c), and which limited the cases of high treason, before vague and uncertain, to three principal heads,—

(a) Dr. Robertson's Hist. Scot. 120.

2b. 1.

(c) Chap. 2.

(b) Cotton's Abridg. p. 108,

RICHARD II. succeeding his grandfather, the dignity of the law, together with the honour of the kingdom, by reason of the weakness of this prince, and the difficulties occurring in his government, SEEMED SOMEWHAT TO DECLINE; as may appear by comparing the twelve last years of Edward III. commonly called *quadragesims*, with the reports of king Richard II. wherein appears a visible declination of the learning and depth of the judges and pleaders.

IT is true, we have no printed continued report of this king's reign. But I have seen the entire years and terms thereof in a manuscript, out of which, or some other copy thereof, I suppose Fitzherbert abstracted those broken cases of this reign in his Abridgment.

IN all those former times, especially from the end of Edward III. back to the beginning of Edward I. the learning of the common law consisted principally in assizes and REAL ACTIONS. Rarely was any title determined in any personal action; unless in cases of titles to rents, or services,

the conspiring the death of the king, the levying war against him, and the adhering to his enemies; and the judges were prohibited, if any other cases should occur, from inflicting the penalty of treason, without an application to parliament. The bounds of treason were indeed so much limited by this statute, which still remains in force without any alteration, that the lawyers were obliged to enlarge them, and to explain a conspiracy for levying war against the king, to be equivalent to a conspiracy against his life; and this interpretation, seemingly forced, has, from the necessity of the case, been tacitly acquiesced in. Mr. Justice Blackstone has enumerated some other legal improvements which were effectuated under the auspices of this brave and indulgent sovereign (d).

(d) Blac. Com. 4 v. 428.

by replevin. And the reasons thereof were principally these, viz.

FIRST, because these ancient times were great favourers of THE POSSESSOR; and therefore, if about the time of Edward II. a disseisor had been in possession by a year and a day, he was not to be put out without a recovery by assize. Again, if the disseisor had made a feoffment, they did not countenance an entry upon the feoffee, because thereby he might lose his warranty, which he might save, if he were impleaded in an assize or writ of entry. By this means real actions were frequent, and also assizes.

SECONDLY, they were willing to quiet men's possessions. And therefore after a recovery, or bar, in an assize or real action, the party was driven to an action of a higher nature.

THIRDLY, because there was then no known action, wherein a person could recover his possession, other than by an assize or a real action. For till the end of Edward IV. the possession was not recovered in an *adjunctione firmæ*; but ONLY DAMAGES.

FOURTHLY, because an assize was a speedy and effectual remedy to recover a possession; the jury being ready impanelled and at the bar the first day of the return. And although by disusage the practicers of law are not so ready in it, yet the course thereof in those times was as ready and as well known to all professors of the law, as the course of *ejectione firmæ* is now. [B.]

TOUCHING

[B] "All the law concerning disseisins existed and was in practice prior to the assize of *novel disseisin*. The assize was introduced, probably



TOUCHING the reports of the years and terms of Henry IV. and Henry V. I can only say, they do not arrive, either in

probably from the usage of Normandy, for the *Grand Coutumier* treats of assizes in or before the reign of Henry the Second. Glanville, who wrote in that reign, calls the great assize a benefit *clementiam principis de consilio procerum populis indultam.*" And the Myreur (a) says "Glanville introduced it."

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure; and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse*

Disseisin therefore must mean, some way or other turning the tenant out of his tenure; usurping his place and feudal relation. At this time no tenant could alien without licence of the lord. When the lord consented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage or fealty was solemnly sworn; and suit of court and services were frequently done. The freeholder represented the whole fee; did the duty to the lord; and defended the whole fee against strangers.

The freehold never could be in abeyance, because the lord could never be at a loss to know upon whom to call as his tenant; nor a stranger to know against whom to bring his *præcipe*. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons, deriving title from the freeholder *de facto*.

If the disseisor died after one year's nonclaim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. of 32. H. 8. cap. 33. requires five years nonclaim. The feoffee of a disseisor acquired title of possession at this time by one year's nonclaim. The descent to his heir remains privileged as it was at common law; for the 32. Hen. 8. cap. 33. extends not to any feoffee of the disseisor, immediate or mediate. The feoffee of a disseisor was favoured, because he came innocently into the tenure, by a solemn public investiture, with the lord's concurrence.

But the statute "*quia emptores terrarum*" (b) (which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the king as of an honour or manor) and other statutes which extended the power of alienation to the

(a) C. 2. Sec. 25. pa. 150. Edit. 1642.

(b) 18 E. 1.

king's

in the nature of the learning contained in them, or in the judiciousness and knowledge of the judges and pleaders, nor

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king's tenant *in capite*; the frequent releases of feudal services; the statutes of uses, and of wills; and, at last, the total abolition (c) of all military tenures, have left us little but the names of feoffment, seisin, tenure, and freeholder, without any precise knowledge of the thing originally signified by those sounds. The idea which modern times annex to freehold or freeholder, is taken merely from the duration of the estate. Copyholds, and the customary freeholds in the North, retain some faint traces, in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder or customary freeholder *de facto*; in prejudice of the rightful tenant. It is obvious too, that usurping such a tenure, is a different fact from the naked possession or occupation of the land. But whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisions, upon every change of a tenant, by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that at the time alluded to, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin, differed from a possessor by wrong. Bracton, *De Assisa Nova Disseisinæ*, puts many cases of possession wrongfully taken, which he calls intrusion, because there is no disseisin. "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" VESTIMENTO is seisin, investiture; (from whence the Saxon term *vest*) a metaphor which the feudists took from clothing, and by which they meant to intimate, "that the naked possession was clothed with all the solemnities of a feudal tenure." A particular tenant, according to feudal notions, was in, as of the seisin of the fee, of which his estate was a part. If he aliened the fee (which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held), he forfeited his particular estate, for having betrayed the seisin with which he was entrusted. But on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseised the reversioner.

Bracton, who wrote in the reign of Henry III. before tenants could alien without licence, mentions the disseisin in this case as a necessary

(c) 12. C. c. 23. and 13. C. 2. c. 7.

in any other respect arise to the perfection of the last twelve years of Edward III.

consequence, and as a thing which could not possibly be otherwise.

"Item facit quis Disseysinam, cum quis in seysina fuerit ut de libero tenemento & ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo; alium feoffaverit, in pre-judicium veri domini, & fecerit alteri liberum tenementum; cum duo simul & *semel*, de eodem tenemento & in solidum, esse non possunt in seysina." He considers it as impossible for the true tenant not to be put out, when another actually came into his place.

So late as the 32d of Eliz. in the case of Matheson v. Trot, 1 Leon. 209. the distinction upon which the judgment turns is, that Henry Denny gained a wrongful possession in fee; but did not gain any seisin, so no disseisor, therefore the descent to his heir is not privileged." Nobody can disseise the king; neither can any one be disseised to the use of the king. The king may be wrongfully dispossessed: but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The king cannot be made a disseisor, not because it is wrong, for he may, in fact, withhold the possession of land from a subject contrary to right. But the reason seems, according to the feudal system, to be this: A subject never could stand in the king's seisin or tenure; and the king never could be in the feudal relation of a subject. By that policy, all real property was held mediately or immediately of the king. In the king himself all real property was allodial. The precise definition of what constituted disseisin, which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known; but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we are confounded. For, after the assize of *novel disseisin* was introduced, the legislature by many acts of parliament, and the courts of law by liberal constructions in furtherance of justice, extended this remedy, for the benefit of the owner, to every trespass or injury done to his real property, if by bringing his assize he thought fit to admit himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Lit. 180. b. It lay against the tenant who was no disseisor; as the heir of a disseisor or his feoffee. Stat. Gloucester. It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. sect. 233. It lay for outrageous distresses.

distress. 2. Inst. 412. It lay against guardian, or particular tenant, who made a feoffment, as well as against their feoffees. 2. Inst. 413. The Stat. of Westm. 2: c. 25. extends it to a man's depasturing the ground of another; or taking fish, in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style 407. If a guardian assigns dower to a woman not dowable, the owner may elect to make her a disseisor, 24. Ed. 3. 43. cited in Cro. Car. 203. In a word, for the sake of the remedy, as between the true owner and the wrong doer, to punish the wrong; and, as between the true owner and naked possessor, to try the title, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner admits himself disseised.

The law books treat of disseisin, with a view to the assize; which was the common method of trying titles till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by equitable construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common authorities from whence descriptions have been cited of a disseisin. The definitions in the books, though very imperfect, favour often of that which originally was an ACTUAL disseisin in spite of the owner.

Littleton in sect. 279. defines disseisin with an &c. "Where a man enters into lands or tenements, where his entry is not congeable, and ousteth him which hath the freehold, &c." The comment says, "Every entry is no disseisin, unless there be an ouster of the freehold;" and Co. Lit. 153. b. says, "Disseisin is putting a man out of seisin, and ever implies a wrong: but disseisin or ejectment is putting out of possession, and may be by right or wrong. *Disseisin est un personal trespass de tortious ouster del seisin.*"

Though the term "disseisin," used, happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. The distinction of disseisin AT ELECTION, is made in the case of Blunden v. Baugh, Cro. Car. 303. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held, "that the lessee for years of the tenant at will, was a disseisor AT THE ELECTION OF THE ORIGINAL LESSOR, for the sake of his remedy, but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." If a *præcipe* was



brought against him, he might say, "I am not tenant to the freehold." When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease; but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry. If the lessee for life or years makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid, as a receiver, or bring an ejectment, and choose whether he will be considered as disseised. Metcalf on the demise of Kynaston v. Parry and others, a case reserved at Salop assizes, 25th March 1742, for the opinion of the Court of Exchequer (who gave judgment in it on the 24th of November 1743), was thus: Tenant in tail of lands leased by his father to a second son, for lives, (under a power) upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden, "that this was only a disseisin of the freehold at election; that therefore he could not make a good tenant to the *præcipe*." And the recovery was adjudged bad.

Except the special case of fines with proclamations, which stands entirely upon distinct grounds, the construction of the stat. of 4. Hen. 7. c. 24. one can scarce suggest a case where the true owner, whose entry is not taken away, may not elect, by pursuing a possessory remedy, to be deemed as not having been disseised.

The consequence of actual disseisins, considered as such, continue law to this day. The disseised cannot dispose or devise; the descent takes away his entry. There are two cases cited in the case of Blunden v. Baugh, material to this point. Poult v. Blackman, B. R. Trin. 18. Jac. Rot. 1230. Palmer 201 (d). The case, in effect and operation, was this: Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will at the election of the original lessor was a disseisin, yet they adjudged his devise good; because he had not ELECTED to admit himself disseised, and by making a will intimated the contrary.

Another case was in the 14th of Eliz.—Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William, afterwards, a certain rent, claiming to hold as tenant at

(d) Cro. Jac. 659. S. C.

will,

will, and died. His heir entered ; upon whom Sir William entered. It was adjudged, " that at the election of Sir William, Sir Ambrose was a disseisor ; but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin, and consequently the descent no bar to his entry."

In the case of Poussy v. Blackman, Palmer 205. it is said, " If a disseisee devise and afterwards enter, the devise is good." This Dodderidge denied, and said there must be a new publication ; which seems right, if there ever was a disseisin ; for where an actual entry is necessary, it will not make good a conveyance made before : as was holden in B. R. & Dom Proc. in the case of Berrington v. Parkhurst (e). The actual entry could not support the lease made before. Yet in Salk. 237. (f) it is agreed, " the devise is good, because he was seised *ab initio*, so as he might bring trespass:" *i. e.* he never was disseised at all, by his election ; and he might make that election, without an entry ; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in !

In the case of Poussy v. Blackman, there was no entry ; and after much argument, it was at last resolved, unanimously, by the whole Court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, " that the devise was good," and that the owner, by making a devise, shewed his election not to be disseised.

Taking possession under a judgment in ejectment, never can be a disseisin of the freehold. Suppose it a real proceeding, the termor of a disseisee might, at the old law, recover against the disseisor. He might recover against the feoffee of his lessor ; but he never could thereby become a disseisor of the freehold ; he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of a freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee ; if the lessor was disseised and might enter, it enured to the disseisee ; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding, as it is, a fictitious remedy ; then in truth and substance, a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the

(e) A. D. 1738.

(f) Bunter v. Coke.

right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed, according to right, *prout lex postulat*.

If he has a freehold, he is in as a freeholder. If he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser; and without any re-entry by the true owner, is liable to account for the profits.

The true owner may enter upon a disseisor, but after judgment in ejectment, an actual entry would not be permitted. An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter. Therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession; and every plaintiff in ejectment must shew a right of possession, as well as of property (*g*).

There is an excellent analysis of real actions, in the first volume of Comyns's Digest; after which the student may consult Fitzherbert's *Natura Brevium*, with Sir Matthew Hale's Commentary, and the tenth and eleventh chapters of the third book of Mr. Justice Blackstone's Commentaries.

In addition to our author's progress of the law under the reign of Richard the Second, it is proper to remark, that the statutes of *praemunire*, for effectually depressing the civil power of the pope, were the work of this and the precedent reign. The establishment also of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century; though the seeds of the general reformation which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution introduced into the laws of the land by the influence of the regular clergy (*b*). It was usual at this time for the Church, that they might elude the mortmain act (*i*), to make their votaries leave lands IN TRUST to certain persons, under whose names the clergy enjoyed the benefit

(*g*) See the case of Taylor, ex dm. Atkyns v. Horde, *pissim*, 1. Burr. 60.

(*b*) Blac. Com. 4 v. 428.

(*i*) M. C. 9. H. 3. c. 36. 7. Ed.

1. st. 2. 13. Ed. 1. c. 32. 18. Ed. 1. st. 1. c. 3. 27. Ed. 1. st. 2. 34. Ed. 1. st. 3. 18. Ed. 3. st. 3. c. 3. 15. R. 2. c. 5.

BUT the times of Henry VI. as also of Edward IV. Edward V. and Henry VII. were times that abounded with learning and excellent men. There is little odds in the usefulness or learning of these books ; only the first part of Henry VI. is more barren, spending itself much in learning of little moment, and now out of use. But the second part is full of excellent learning. [C.]

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IN

of the bequest. The parliament stopped the progress of this abuse (*†*). The greatest novelty introduced into the civil government during this reign, was the creation of peers by PATENT. The lord Beauchamp of Holt was the first peer who was advanced to the house of lords in this manner. Though he was summoned, he never sat. His patent, however, could never have been deemed valid, because Michael de la Pole was the Lord Chancellor who affixed the seal to it, which had been before taken from him by act of parliament, and he declared incapable of ever having it again. This, then, was a single and ineffectual attempt to create a new peer without the assent of parliament, which was the usual way ; above thirty having been made so in that very reign. His successors were too wise to follow this example, for every barony newly created, till the union of the Roses, which were about fourteen, were every one of them, as appears on the face of the patents, by authority of parliament, if we except two or three ; and even these, on a close examination, will appear not to be new baronies, but re-grants of old feudal baronies by tenure ; which undoubtedly were all in the sole disposition of the king (*‡*).

[C] From the time of Richard the Second to that of Henry the Seventh, the civil wars and disputed titles to the crown gave no leisure for farther juridical improvement ; “ *nam silent leges inter arma* ;” and yet to these very disputes we owe the happy loss of all the dominions of the crown on the continent of France ; which turned the minds of subsequent princes entirely to domes-

(*†*) Knyghton, 27. 38. Cotton 5. sec. 27. and 28. Sulliv. 193. ed. 355. 1776.

(*‡*) Selden-Tit. Hon. part 2. chap.



IN the times of those three kings, Henry VI. Edward IV. and Henry VII. the learning seems to be much alike. But these two things are observable in them, and indeed generally in all reports after the time of Edward III. viz.

FIRST, that real actions and assizes were not so frequent as formerly. For many titles of land were determined in personal actions; and the reasons hereof seem to be,

1st, BE-

tic concerns. To these likewise we owe the method of barring entails by the fiction of common recoveries, invented originally by the clergy to evade the statute of mortmain, but introduced under Edward the Fourth for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of uses, another of the clerical inventions (a).

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent to set property free, allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the statute *de donis* repeated what the law of tenures said before, "that the tenor of the grant should be observed," than the same bent permitted tenant in tail of the freehold and inheritance to make an alienation voidable only, under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years under the inconvenience of so much property being unalienable, and the great men, to raise the pride of their families, and in those turbulent times to preserve their estates from forfeitures, preventing any alteration by legislative authority, the same bent threw out a fiction in Taltarum's case (b), by which tenant in tail of the freehold and inheritance,

(a) Blac. Com. 4 v. 428.

p. 7, 8, 9, 10.

(b) Pigott on Common Recoveries,

1<sup>st</sup>, BECAUSE the learning of them began, by little and little, to be less known or understood.

2<sup>dly</sup>,

or with consent of the freeholder, might aliene absolutely. Public utility adopted and gave sanction to the doctrine, for the real political reason, "TO BREAK ENTAILS." But the ostensible reason, from "the fictitious recompence," hampered succeeding times how to distinguish cases which were within the false reason given, but not within the real policy of the invention: till at last the legislature applauded common recoveries, and lent its aid by the acts of 11. H. 7. c. 20. 33. Hen. 8. c. 31. 34. & 35. Hen. 8. c. 20. 14. Eliz. c. 8. and 14 Geo. 2. c. 20. which last is a retrospective and declaratory law, and seems to have restored the original tenant to the *precipue*.

As the legislature has for ages avowed the proposition, we may now say, that COMMON RECOVERIES ARE A MERE FORM OF CONVEYANCE. All necessary circumstances of form and ceremony are taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property.

Alienations were allowed, yet in such a shape as necessarily required deliberation and delay; and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with consent of the owner of the first estate for life. The eldest son was restrained in the life-time of his father, or mother, or any other ancestor or relation, seized for life, under a family settlement.

When a termor after the 4th of Henry VII. made a feoffment, and levied a fine with proclamations, and insisted upon five years non-claim, the Judges with strong sense said, though a feoffment by tenant for life, or years, or at will, is a disseisin, it shall not operate as a disseisin, to enable the termor himself to bar the inheritance, by a fine with proclamations, according to the 4 H. 7. c. 20. For, say they, "it was never the intent of the makers of the act, that those who could not levy a fine, should by making an estate by wrong and fraud, be enabled to bar those who had right. For if they themselves without such fraudulent estate could not levy a fine to bar those who had the freehold and inheritance, certainly the makers of the 4th H. 7. c. 20. did not intend, that by making of an estate by fraud and practice, they should have power to bar them; and such fraudulent estate is as no estate, in the judgment of the law." So as to a common recovery, it was never the intent, that those who could not suffer a recovery should, by making an estate by wrong and fraud,  
be

2dly, THE ancient strictness of preserving possession to possessors till eviction by action, began not to be so much in

be enabled to bar those in remainder or reversion, who had a right. For if they themselves, without such fraudulent estate, could not suffer a recovery to bar those in remainder and reversion, certainly the framers of this qualified species of alienation did not intend, that by making an estate by fraud and practice, they should have power to bar them; for a common recovery, which the parties have no power to suffer directly, cannot be made good by wrong and fraud.

After the statute *de donis*, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation by discontinuance; but he could not acquire to himself that privilege by an injurious entry and feoffment. Co. Lit. 347. Hob. 323. If in cases of recoveries stratagem should prevail, redress would follow too late (c).

A remarkable law passed in the reign of Henry VI. for the due election of members of parliament in counties. After the fall of the feudal system, the distinction of tenures was in a great measure lost; and every freeholder, as well those who held of mesne lords, as the immediate tenants of the crown, were by degrees admitted to give their votes at elections. This innovation was confirmed by a law of Henry the Fourth (d), which gave right to such a multitude of electors, as was the occasion of great disorder in the eighth and tenth of this king; therefore, laws were enacted, limiting the electors to such as possessed forty shillings a-year in land, free from all burden within the county (e). This sum was equivalent to near twenty pounds a-year of our present money; and it were to be wished, that the spirit as well as letter of this law had been maintained.

The preamble of the statute is remarkable. "Whereas the elections of knights have of late, in many counties of England, been made by outrageous and excessive numbers of people, many of them of small substance and value, yet pretending to a right equal to the best knights and esquires; whereby manslaughter, riots, batteries, and divisions among the gentlemen and other people of the same counties, shall very likely rise and be, unless due remedy be provided in this behalf, &c." We may learn from these expressions what an important matter the election of a Member of Parliament was now become in England. That assembly was

(c) By lord Mansfield, in the case of Taylor, ex dm. Atkyns v. Horde, 1. Bur 60. cap. 15.

(e) 8 Hen. 6. cap. 7. 10 Hen. 6. cap. 2.

(d) Stat. at large, 7. Hen. 4.

in use ; unless in such cases of descents and discontinuances.

—The latter necessarily drove the demandant to his formedon,

or

beginning in this period to assume great authority. The commons had it much in their power to enforce the execution of the laws ; and if they failed in their duty, in this particular, it proceeded less from any exorbitant power of the crown, than from the licentious spirit of the aristocracy, and perhaps from the rude education of the age, and their own want of a due sense of the advantages resulting from a regular administration of justice.

As to the reign of Henry the Seventh, his ministers (not to say the king himself) were more industrious (in the opinion of Blackstone) in hunting out prosecutions upon old and forgotten penal laws, for the mean and disgraceful purpose of extorting money from the subject, than in framing any new and beneficial regulations. For the distinguishing character of this reign was (says the commentator) that of smassing treasure in the king's coffers, by every means that could be devised : and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object (*f*). The capacity of Henry was excellent, but in some degree contracted by the narrowness of his heart. Avarice was his ruling passion ; and he remains an instance, almost singular, of a man, placed in an high station, and possessed of talents for great affairs, in whom that passion predominated above ambition. Though the opinion which Mr. Justice Blackstone entertains, may probably be right, yet it is but proper to remark, that Henry is celebrated by his historian for many good laws, which he caused to be enacted for the government of his subjects. It must be confessed that several considerable regulations are found among the statutes of this reign, as well with respect to the police as the commerce of the kingdom. To gratify the insatiable avarice of Henry, the court of star chamber (conspicuous the commentator) " was new modelled, and armed with " powers the most dangerous and unconstitutional over the persons " and properties of the subject (*g*). " It is true, that early in the reign of Henry, the authority of the star-chamber was in some cases confirmed by act of parliament (*b*). Lord Bacon extols the use of this court ; but men began, during the age of that historian, to feel that so arbitrary a jurisdiction was totally incompatible with liberty ; and in proportion as the spirit of independence rose still higher in the

(*f*) Com. 4 v. 429.

(*g*) *Id. ib.*

(*c*) Rot. parl. 3 H. 7. p. 17.



or his *cui in vita*, &c. But the descents that tolled (f) entry were rare, because men preserved their rights to enter, &c. by continual claims.

(f) In other words, that *take* applied, meaning, to bar, defeat, away entry. Blac. Com. 3 v. or take away. See stat. 8 Henry 176. — the word *roll*, as here VI. cap. 9.

nation, the aversion against it increased, till this "court of criminal equity" was intirely abolished, by act of parliament, in the reign of Charles the First. Mr. Justice Blackstone enumerates many other particulars which were allowed and contrived to increase the riches of the sovereign; from whence he infers, that "there is hardly a statute in this reign introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer (i)." Let it not be forgotten however, that in this reign suits were given to the poor *in forma pauperis*, as it is called; that is, without the payment of any fees (l); a good law at all times, especially in that age, when the people laboured under the oppression of the great. But the most important law in its consequences which was enacted during the reign of Henry, was that by which the nobility and the gentry acquired a power of destroying the ancient entails, and of alienating their estates (l). It is true that the practice was introduced in the reign of Edward the Fourth; but it was not, properly speaking, law, till the statute of Henry the Seventh; which, by correcting some abuses which attended that practice, indirectly gave a sanction to it. By means of this law, combined with the approaching luxury and refinements of the age, the great fortunes of the barons were gradually dissipated, and the property of the commons increased. It is probable that Henry foresaw and intended this consequence; because the constant scheme of his policy consisted in depressing the great, and exalting those who were more dependent on him. — One great check to industry in England was the erecting of corporations; an abuse which is not yet entirely corrected. A law was enacted, that corporations should not pass any bye-laws without the consent of three of the chief officers of state (m). And to the praise of this prince it may be observed, that sometimes, in order to promote commerce, he lent to merchants sums of money without interest, when he knew that their stock was not sufficient for those enterprizes which they had in view.

(f) Com. 4 v. 429, 430.

(l) 11 H. 7. c. 12.

(l) 4 H. 7. c. 24.

(m) 19 H. 7. c. 7.

3dly, BECAUSE the statute of 8. Hen. VI. had helped men to an action to recover their possessions by a writ of forcible entry; even while the method of recovery of possessions by ejectments was not known or used.

THE SECOND thing observable is, that though pleadings in the times of those kings were far SHORTER than afterwards, especially after Henry VIII. yet they were much longer than in the time of king Edward III. ; and the pleaders, yea and the judges-too, became somewhat TOO CURIOUS therein. So that that art, or dexterity of pleading, which in its use, nature and design, was only TO RENDER THE FACT PLAIN AND INTELLIGIBLE, AND TO BRING THE MATTER TO JUDGMENT WITH A CONVENIENT CERTAINTY, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become A PIECE OF NICETY AND CURIOSITY: which how these later times have improved, the length of the pleadings—the many and unnecessary repetitions—the many miscarriages of causes, upon small and trivial niceties in pleading, have too much witnessed (g).

#### I SHOULD

(g) What would sir Matthew Hale have said, had he lived in these times of “ nicety and curiosity ? ”—times in which pleading seems to be involved in all that perplexity can suggest, or prolixity supply ! He might, perhaps, impute it to incapacity, or to design ; in either light, a reproach to those, whose duty it is, not only to be well informed of the merits of a cause, but to apply the pleadings to the real point in controversy ; and that in a mode

the most simple and intelligible.—The science of pleading (however those who do not understand, may affect to despise it) is admirably calculated for the purposes of analysing a cause ; of extracting, like the roots of an equation, the true points in dispute, and referring them with all imaginable simplicity to the court or to the jury. It is reducible to the strictest rules of pure dialectic ; and were it scientifically taught in our publick seminaries of learning,

I SHOULD now say something touching the times since Henry VII. to this day, and therefore shall conclude this chapter with some general observations touching the proceedings of law in these later times.

AND first, I shall begin where I left before, touching the length and nicety of pleadings, which at this day far exceeds not only that short, yet perspicuous, course of pleading, which was in the time of Henry VI. Edward IV. and

ing, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding as effectually as the famed peripatetic system; which, how ingenious and subtle soever, is not so *honourable*, so *laudable*, or so *profitable*, as the science in which Littleton exhorts his sons to employ their courage and their care. Jones's *Iſæus*, pref. disc. 25. The earl of Mansfield, who, with the most comprehensive and enlightened genius, possessed the most consummate and enlarged knowledge, remarked, that "the substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained: but by being misunderstood and misapplied, are often made use of as instruments of chicane." 1 Burr. 319. Though this science, when properly applied, merits every commendation, yet nothing would perhaps more prevent "the

many miscarriages of causes," or more promote the ends of justice, than to enact that the defendant shall in all actions, or giving previous notice of his intended defence to the plaintiff, be permitted to plead the general issue, and give the merits of his case in evidence. Without referring to the numerous cases in which the legislature has already permitted it to be done, it need only be remarked, that in the mixed action of ejectment it is the uniform practice: so in personal actions of considerable importance; as questions arising on mercantile contracts, by insurance, bills of exchange, and the like: so in almost all special actions on the case, and in a great measure even in the common action of *assumpsit*. Lamentable at present is the increase of costs upon the suitor, and that even in cases where he succeeds; an evil, which if not speedily corrected, may in the end be productive of serious consequences.

Henry

Henry VII. but those of all times whatsoever, as our vast presses of parchment for any one plea do abundantly witness.

AND the reasons thereof seem to be these, viz.

FIRST, because in ancient times the pleadings were drawn AT THE BAR, and the exceptions also taken at the bar: which were rarely taken for the pleasure, or curiosity, of the pleader; but only, when it was apparent, that the omission, or the matter excepted to, was for the most part THE VERY MERIT AND LIFE OF THE CAUSE; and purposely omitted, or mispleaded, because his matter, or cause, would bear no better. But now, the pleadings being first drawn in writing, are drawn to an EXCESSIVE LENGTH, AND WITH VERY MUCH LABORIOUSNESS AND CARE ENLARGED, lest it might afford an exception not intended by the pleader, and which could be easily supplied from the truth of the case; lest the other party should catch that advantage, which commonly the adverse party studies;—not in contemplation of the merits, or justice, of the cause, but to find a slip to fasten upon; though in truth, either not material to the merits of the plea, or at least not to the merits of the cause, if the plea were in all things conformable to it.

SECONDLY, because those parts of pleading which in ancient times might perhaps be material, but at this time are become only mere styles and forms, are still continued with much religion; and so all those ancient forms at first introduced for convenience, but NOW NOT NECESSARY, or it may



may be, antiquated as to their use, are yet continued as things wonderfully material; though THEY ONLY SWELL THE BULK, and contribute nothing to the weight of the plea.

THIRDLY, these pleas being mostly drawn by clerks, who are paid for entries and copies thereof, the larger the pleadings are, the more profits come to them; and the dearer the clerk's place, the dearer he makes the client pay (*b*).

(*b*) It may be considered as a reproach to the administration of justice, that the fees of its officers should be in proportion to the length of its proceedings. In one of the superior courts at Westminster, some of its officers are legally entitled to a fee from the plaintiff in every cause, on the filing of his declaration; a fee which is either greater or less, as the declaration is either long or short; though the officers have no extra (if any) trouble, in the one case or the other; and though no part of the pleadings are now, nor have been for many years, drawn either by themselves or their clerks. This has long been a subject of complaint. Exclusive of the burthen on the suitor, which in many cases is not light, it prevents the court itself from bearing that share of the public business which it is calculated to sustain, and bounden to endure.

By Stat. 5 & 6 Ed. 6. c. 16.  
"against buying and selling

"of offices," the sale of all offices "which concern the administration or execution of justice, or any clerkship to be occupied in any manner of court of record wherein justice is to be ministered," is positively forbidden: but by a proviso, (*s. 7.*) the act is not to extend "to any of the chief justices of the king's bench, or common place, or to any of the justices of assize."

Were this proviso repealed, and an adequate compensation made to the elevated characters in whose favour it was enacted, it would no doubt be grateful to them and beneficial to the public. It would not only silence the clamour of disappointment, but contribute, by wise and popular means, to enforce the true spirit of the act; namely, (as its preamble states) "persons worthy and meet to be advanced, would be preferred, and no other."

FOURTHLY,

FOURTHLY, an overforwardness in courts to give countenance to frivolous exceptions, though they make nothing to the true merits of the cause; whereby it often happens that causes are not determined according to their merits, but do often miscarry for inconsiderable omissions in pleading (i).

BUT, secondly, I shall consider what is the reason that in the time of Edward I. one Term contained not above two or three hundred rolls, but at this day one Term contains two thousand rolls, or more.

THE reasons whereof may be these, viz.

1st, Many petty businesses, as trespasses and debts under 40s. are now brought to Westminster, which used to be dispatched in the county or hundred courts. And yet the plaintiffs are not to be blamed, because at this day those inferior courts are so ill served, and justice there so ill administered, that they had better seek it (where it may be had) at Westminster, though at somewhat more expence (k).

2dly, Multitudes of attornies practising in the great courts at Westminster, who are ready at every market to gratify the spleen, spite, or pride, of every plaintiff (l).

(k) However pertinent this fourth reason of sir Matthew Hale might have been heretofore, it is not now in the least degree applicable; the courts having been, for many years, and that much to their honour, astute to discountenance and reprove all frivolous exceptions, and to forward as much as possible, the true merits of every cause.

(l) This is now in a great degree remedied by the erection of courts of conscience, for the recovery of small debts.

(1) The number of attornies now (1794) on the rolls of the different courts at Westminster, is almost incredible; more than two thousand practise within London and its environs.

3dly, A great increase of people in this kingdom above what they were anciently; which must needs multiply suits.

4thly, A great increase of trade and trading persons, above what there were in ancient times; which must have the like effect.

5thly, Multitudes of new laws, both penal and others; all which breed new questions, and new suits at law; and in particular the statute touching the devising of lands;—*cum multis aliis.*

6thly, The multiplication of actions upon the case, which were rare formerly, and thereby wager of law ousted, which discouraged many suits. For when men were sure, that in case they rested upon a bare contract without specialty, the other party might wage his law, they would not rest upon such contracts without reducing the debt into a specialty, if it were of any value; which created much certainty, and accorded many suits.

AND herewith I shall conclude this chapter, shewing what progress the law has made, from the reign of king Edward I. down to these times (*m*).

(*m*) Mr. Justice Blackstone having, in the most elegant and judicious manner, continued this plan of sir Matthew Hale, from the reign of Henry VII. to that of his present majesty, I there-

fore take the liberty of referring the reader to the fourth volume of the Commentaries of that learned judge—from page 439 to 443 inclusive.



